RECORD AND BRIEFS

16-399

No.

Supreme Court, U.S.
FILED
SEP 27 2016
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ANTHONY W. PERRY,

*Petitioner,*

v.

MERIT SYSTEMS PROTECTION BOARD,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit**

## PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER LANDAU, P.C.
*Counsel of Record*
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
*clandau@kirkland.com*

September 27, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

The Merit Systems Protection Board (MSPB) is authorized to hear challenges by certain federal employees to certain major adverse employment actions. If such a challenge involves a claim under the federal anti-discrimination laws, it is referred to as a "mixed" case. This case presents the following question:

> Whether an MSPB decision disposing of a "mixed" case on jurisdictional grounds is subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

INTRODUCTION ..... 1

OPINIONS BELOW ..... 4

JURISDICTION ..... 4

RELEVANT STATUTORY PROVISIONS ..... 4

STATEMENT OF THE CASE ..... 5

A. Background ..... 5

B. Proceedings Below ..... 5

REASON FOR GRANTING THE WRIT ..... 9

Review Is Necessary To Bring Coherence And Clarity To The Statutory Regime Governing Judicial Review Of MSPB Decisions. ..... 9

CONCLUSION ..... 21

## APPENDIX CONTENTS

D.C. Circuit Opinion,
July 22, 2016 ..... 1a

D.C. Circuit Order,
December 18, 2014 ..... 16a

D.C. Circuit Order,
August 21, 2014 ..... 18a

Merit Systems Protection Board Order,
August 6, 2014 ..... 20a

Administrative Law Judge Decision,
December 23, 2013 ..... 32a

Merit Systems Protection Board Order,
June 12, 2013 ..... 59a

Administrative Law Judge Decision,
July 30, 2012 ..... 71a

Administrative Law Judge Order,
May 7, 2012 ..... 81a

5 U.S.C. § 7512 ..... 90a

5 U.S.C. § 7513 ..... 91a

5 U.S.C. § 7702 (excerpts) ..... 93a

5 U.S.C. § 7703 (excerpts) ..... 97a

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Arbaugh v. Y&H Corp.*,
546 U.S. 500 (2006) ..... 15

*Bell v. Hood*,
327 U.S. 678 (1946) ..... 15

*Burzynski v. Cohen*,
264 F.3d 611 (6th Cir. 2001) ..... 12

*Butler v. West*,
164 F.3d 634 (D.C. Cir. 1999) ..... 17

*Conforto v. MSPB*,
713 F.3d 1111 (Fed. Cir. 2013) ..... 2, 13-15, 17-20

*Downey v. Runyon*,
160 F.3d 139 (2d Cir. 1998) ..... 2, 19

*Elgin v. Department of the Treasury*,
132 S. Ct. 2126 (2012) ..... 3, 16, 17, 20

*FDIC v. McGlamery*,
74 F.3d 218 (10th Cir. 1996) ..... 20

*Garcia v. Department of Homeland Sec.*,
437 F.3d 1322 (Fed. Cir. 2006) (*en banc*) ..... 14

*Harms v. IRS*,
321 F.3d 1001 (10th Cir. 2003) ..... 2, 19

*Hertz Corp. v. Friend*,
559 U.S. 77 (2010) ..... 18

*Hill v. Department of the Air Force*,
796 F.2d 1469 (Fed. Cir. 1986) ..... 12

*Kloeckner v. Solis*,
133 S. Ct. 596 (2012) ..... 1-2, 4, 8-14, 18-20

*Kloeckner v. Solis*,
639 F.3d 834 (8th Cir. 2011),
*rev'd on other grounds*,
133 S. Ct. 596 (2012) ..... 2, 11, 19

*Kontrick v. Ryan*,
540 U.S. 443 (2004) ..... 15

*Lindahl v. Office of Personnel Mgmt.*,
470 U.S. 768 (1985) ..... 4

*Miller v. Toyota Motor Corp.*,
554 F.3d 653 (6th Cir. 2009) ..... 20

*Powell v. Department of Defense*,
158 F.3d 597 (D.C. Cir. 1998) ..... 8, 18

*Reed Elsevier, Inc. v. Muchnick*,
559 U.S. 154 (2010) ..... 3, 15, 17

*Schultz v. United States Navy*,
810 F.2d 1133 (Fed. Cir. 1987) ..... 15

*Shoaf v. Department of Agr.*,
260 F.3d 1336 (Fed. Cir. 2001) ..... 15, 17

*Stahl v. MSPB*,
83 F.3d 409 (Fed. Cir. 1996) ..... 14

**Statutes and Rules**

5 U.S.C. § 7512 ..... 13

5 U.S.C. § 7513(d) ..... 13

5 U.S.C. § 7702 ..... 9

5 U.S.C. § 7702(a) ..... 11, 14

5 U.S.C. § 7702(a)(1) ..... 16

5 U.S.C. § 7702(a)(1)(A) ..... 10, 13

5 U.S.C. § 7702(e)(3) ..... 17

5 U.S.C. § 7703 ..... 9

5 U.S.C. § 7703(b) ..... 18
5 U.S.C. § 7703(b)(1) ..... 19
5 U.S.C. § 7703(b)(1)(A) ..... 8, 9
5 U.S.C. § 7703(b)(1)(B) ..... 7
5 U.S.C. § 7703(b)(2) ..... 9
5 U.S.C. § 7703(c) ..... 16, 18
28 U.S.C. § 1254(1) ..... 4
28 U.S.C. § 1295(a)(9) ..... 19

**Other Authorities**

Brief for Respondent in Opposition, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813 ..... 3, 11, 12

Brief for Respondent, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261 ..... 3, 10, 13

Petition for a Writ of Certiorari, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 3584742 ..... 9

Reply to Brief in Opposition, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6859422 ..... 12

S. Rep. No. 95-969 (1978) ..... 16

U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants*, available at http://tinyurl.com/hntdsja (last visited Sept. 26, 2016) ..... 20

U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2017* (Feb. 2016),

available at http://tinyurl.com/zcv6lxj
(last visited Sept. 26, 2016) ..... 17

## INTRODUCTION

This case presents this Court with an opportunity to finish the job it started in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012): to bring coherence and clarity to the statutory regime governing judicial review of decisions by the Merit Systems Protection Board (MSPB or Board). That regime, as this Court explained in *Kloeckner*, bifurcates judicial review of MSPB decisions "in crystalline fashion." *Id.* at 604. Decisions in cases challenging certain major adverse employment actions under the federal civil-service laws are reviewed in the U.S. Court of Appeals for the Federal Circuit, whereas decisions in "mixed" cases challenging such actions at least in part under the federal anti-discrimination laws are reviewed in district court. *See id.* Here, as in *Kloeckner*, that simple point should have been the beginning and the end of the matter—petitioner challenged major adverse employment actions under the federal anti-discrimination laws, and hence the MSPB's decision is subject to judicial review in district court.

The D.C. Circuit, however, routed this appeal to the Federal Circuit on the theory that the MSPB disposed of the case on threshold jurisdictional grounds without reaching the merits of petitioner's discrimination claim. But *Kloeckner* specifically rejected the argument that district courts may review only those cases in which the MSPB actually reached the merits of a discrimination claim. *See id.* That argument, this Court explained, has no basis in the statute, which distinguishes only between "kind[s] of cases" (pure civil-service cases vs. "mixed" cases), not the ground on which the MSPB resolved a particular case. *Id.* Thus, *Kloeckner* held, MSPB

decisions in "mixed" cases are subject to review in district court *regardless* of whether the agency reached the merits of a discrimination claim or disposed of the case on non-merits procedural grounds. "[T]he merits-procedure distinction is a contrivance, found nowhere in the statute's provisions on judicial review." *Id.*

The decision below applies a distinction even more contrived than the merits-procedure distinction rejected in *Kloeckner*. Notwithstanding *Kloeckner*, the D.C. Circuit held that it was bound by pre-*Kloeckner* circuit precedent to send MSPB decisions disposing of "mixed" cases on jurisdictional (as opposed to procedural) grounds to the Federal Circuit instead of a district court. The Federal Circuit similarly has applied a jurisdiction-procedure distinction after *Kloeckner*, and thereby expanded its own jurisdiction over MSPB appeals. *See Conforto v. MSPB*, 713 F.3d 1111, 1115-21 (Fed. Cir. 2013). Both the Second and Tenth Circuits endorsed that distinction before *Kloeckner*, *see Downey v. Runyon*, 160 F.3d 139, 146 (2d Cir. 1998); *Harms v. IRS*, 321 F.3d 1001, 1007-08 (10th Cir. 2003), while the Eighth Circuit specifically rejected it in *Kloeckner* itself, *see Kloeckner v. Solis*, 639 F.3d 834, 838 (8th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 596 (2012).

The decisions applying a jurisdiction-procedure distinction have no basis in the statutory text, subvert the statutory objective of providing *de novo* trials in district court for discrimination claims, and and plunge a straightforward statutory scheme into a morass of complexity. The Government itself conceded in *Kloeckner* that the jurisdiction-procedure distinction "has no basis" in the statute, and is

"difficult and unpredictable" to apply in practice. Brief for Respondent at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261 at *25 n.3; Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted). Given that the Government has disavowed the very distinction on which the court below relied, and this Court has characterized that distinction as "confusing," *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010), this case warrants this Court's review. A distinction that is "hazy at best and incoherent at worst" deprives both courts and federal employees (many, if not most, of whom proceed *pro se*) of the necessary "clear guidance about the proper forum for the employee's claims at the outset of the case." *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2134 (2012).

In this absence of review in this case, however, it is difficult to see how the situation will be resolved. The MSPB is bound to follow Federal Circuit law in this area, and thus directs aggrieved employees whose "mixed" cases are dismissed on jurisdictional grounds to seek review in that court. This petition reaches this Court only by serendipity: (1) petitioner, then proceeding *pro se*, sought review in what everyone—including petitioner—now acknowledges was the wrong court: the U.S. Court of Appeals for the D.C. Circuit, and (2) that court appointed counsel to present petitioner's jurisdictional arguments. This petition thus provides this Court with a unique vehicle to clarify the law in this area once and for all.

This Court has long recognized that the question whether an MSPB decision is to be appealed to a

district court or, alternatively, to the Federal Circuit is a matter of "substantial importance," *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 771 (1985), given the millions of federal employees. Insofar as the D.C. Circuit is correct that *Kloeckner* did not expressly answer the question of which court reviews "mixed" cases dismissed by the MSPB on jurisdictional grounds, this Court should do so now. Few things are more wasteful than litigation over the proper court in which to litigate. Accordingly, this Court should grant this petition and reverse the judgment.

## OPINIONS BELOW

The D.C. Circuit's opinion has not yet been published in the Federal Reporter, but is reported at 2016 WL 3947838 and reprinted in the Appendix ("App.") at 1-15a. The MSPB's most recent decision is reported at 2014 WL 5358308, and reprinted at App. 20-31a. The Administrative Law Judge's most recent decision is unreported, and reprinted at App. 32-58a. The MSPB's original decision is reported at 2013 WL 9678428, and reprinted at App. 59-70a. The Administrative Law Judge's original decision is unreported, and reprinted at App. 71-80a.

## JURISDICTION

The D.C. Circuit entered judgment on July 22, 2016. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the Appendix, App. 90-99a.

## STATEMENT OF THE CASE

### A. Background

Petitioner Anthony W. Perry was hired by the U.S. Census Bureau in Suitland, Maryland, in 1982, and worked for that agency for the next thirty years. App. 3a. In the mid-2000s, Perry developed osteoarthritis in his lower back and hip. *Id.* To help Perry manage the pain, his supervisor allowed him to take breaks during normal working hours and to make up missed time or complete outstanding projects after hours. *Id.* Around the same time, Perry filed a series of Equal Employment Opportunity actions alleging employment discrimination based on race and age. App. 34a, 38a.

On June 7, 2011, Perry received a Notice of Proposed Removal from a Census employee who was not his direct supervisor. The Notice proposed to terminate Perry's employment, alleging that he had been absent during regular working hours and thus had been paid for hours he had not worked. Perry contested the charges and pointed to the informal accommodation that his supervisor had provided and his unblemished disciplinary record.

In August 2011, Perry and the agency entered into a settlement agreement that required him to serve a suspension for thirty calendar days, retire no later than September 4, 2012, and forfeit his discrimination claims against the agency. App. 35-38a.

### B. Proceedings Below

After Perry served his 30-day suspension and his retirement took effect, he filed a *pro se* challenge with the Board. An administrative law judge (ALJ),

ordered him to show cause why the challenge should not be dismissed for lack of jurisdiction. App. 81-89a. "Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board," App. 82a, and "the Board cannot review the same claims over which you entered into a settlement agreement with the agency," App. 86a. Perry responded that the settlement agreement had been coerced, and that the subsequent major adverse employment actions were thus involuntary.

After reviewing the evidence but without holding a hearing, the ALJ dismissed the challenge for lack of jurisdiction. App. 71-80a. In particular, the ALJ decided that both the 30-day suspension and retirement were voluntary because they resulted from a voluntary settlement agreement. App. 74-76a. Perry petitioned the Board for review.

As relevant here, the Board granted the petition, and remanded the case to the ALJ for further proceedings. App. 59-70a. The Board concluded that Perry had "made a nonfrivolous allegation of involuntariness sufficient to warrant a jurisdictional hearing," App. 66a, and that the ALJ had thus erred by dismissing the case without holding such a hearing, App. 67-70a.

On remand, the ALJ held a hearing and concluded that Perry "failed to prove that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals." App. 33a. Accordingly, the ALJ once again dismissed the appeal for lack of jurisdiction. *See id.* And Perry once again petitioned the Board for review.

This time, however, the Board affirmed the ALJ. App. 20-31a. The Board concluded that Perry "failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because [he] validly waived his appeal rights therein." App. 27a. The Board's decision included a "**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**." App. 30a. That notice stated in pertinent part:

> You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:
>
> United States Court of Appeals
> for the Federal Circuit
> 717 Madison Place, N.W.
> Washington, DC 20439

*Id.*

Notwithstanding the notice, Perry—still proceeding *pro se*—filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. That court promptly entered an order directing Perry to "show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the United States Court of Appeals for the Federal Circuit." App. 18a. After Perry and the Government both filed briefs on the jurisdictional issue, the D.C. Circuit discharged the show-cause order. App. 16-17a. The court directed the parties to "address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. § 7703(b)(1)(B); and

(2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2)," and appointed counsel as *amicus curiae* "to present arguments in favor of petitioner's position." App. 17a. Judge Henderson dissented from the order, noting that she "would grant [the Government's] request to transfer the case to the Federal Circuit." App. 16a n.*.

In the subsequent briefing, everyone (including petitioner) agreed that the D.C. Circuit lacked jurisdiction. App. 5a. Thus, the only question was whether that court should transfer the case to a district court or the Federal Circuit. *Id.* The D.C. Circuit held, based on pre-*Kloeckner* circuit precedent, that it was constrained to transfer the case to the Federal Circuit. *See* App. 2-3a (citing *Powell v. Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998)). *Powell* was not necessarily incompatible with *Kloeckner*, the court declared, because the MSPB had dismissed the appeal in *Powell* (like the appeal here) on *jurisdictional* grounds, whereas the MSPB had dismissed the appeal in *Kloeckner* on *procedural* grounds. App. 7-15a. "In short," the court concluded, "we remain bound by *Powell*," and thus transferred this case to the Federal Circuit. App. 15a.

The Federal Circuit docketed the appeal, but granted Perry's unopposed motion to hold the briefing in abeyance until this Court resolves the jurisdictional issue presented in this petition. *See* Order [Dkt. 21], *Perry v. MSPB*, No. 2016-2377 (Fed. Cir. Aug. 31, 2016).

## REASON FOR GRANTING THE WRIT

### Review Is Necessary To Bring Coherence And Clarity To The Statutory Regime Governing Judicial Review Of MSPB Decisions.

The atextual jurisdiction-procedure distinction that the D.C. Circuit applied in this case contravenes the judicial review provisions of the Civil Service Reform Act, 5 U.S.C. § 7703, App. 97-99a, deepens a circuit conflict, and engenders the very confusion about the proper forum for judicial review that this Court sought to put to rest four years ago in *Kloeckner*.

This Court granted certiorari in that case to answer the following question: "If the MSPB decides a mixed case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?" Petition for a Writ of Certiorari at i, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 3584742, at *i. This Court held that the statute provided a clear answer to that question: pure civil-service cases are reviewable in the Federal Circuit, while "mixed" cases involving a discrimination claim are reviewable in district court. *See Kloeckner*, 133 S. Ct. at 603-04.

Section 7703 of the Act, which addresses judicial review of MSPB decisions, generally routes such review to the Federal Circuit "[e]xcept as provided in ... paragraph (2) of this subsection." 5 U.S.C. § 7703(b)(1)(A), App. 97a. Paragraph (2), in turn, specifies that "[c]ases of discrimination subject to the provisions of section 7702 of this title"—*i.e.*, "mixed" cases—shall be filed in district court. *Id.* § 7703(b)(2), App. 98a. And "mixed" cases are those

in which a federal employee or applicant "(A) has been affected by an action which the employee or applicant may appeal to the [MSPB]"—*i.e.*, a major adverse employment action—and "(B) alleges that a basis for the action was discrimination prohibited by" federal anti-discrimination laws. *Id.* § 7702(a)(1)(A), (B), App. 93a. "Ergo, mixed cases shall be filed in district court," regardless of whether the MSPB reached the merits of the discrimination claim or disposed of the case on non-merits grounds. *Kloeckner*, 133 S. Ct. at 604.

This Court dismissed the Government's contrary interpretation of the statute as "tortuous," and based on a misguided policy argument. *Id.* at 607 n.4. The Government argued that it makes sense for the Federal Circuit to review MSPB decisions unless the Board reaches the merits of a discrimination claim, because Congress sought to "'ensur[e] that the Federal Circuit would develop a uniform body of case law governing federal personnel issues.'" *Kloeckner*, 133 S. Ct. at 607 n.4 (quoting Brief for Respondent at 32, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261, at *32). After rejecting that policy argument on its own terms (the Federal Circuit did not even exist when Congress enacted this statutory regime), the Court emphasized that "[i]n any event, even the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text." *Id.*

Although the MSPB's non-merits ground for dismissal in *Kloeckner* was procedural, rather than jurisdictional, both the Government and the petitioner in that case recognized that this is a distinction without a difference. In opposing

certiorari, the Government acknowledged that the "distinction between procedural MSPB dismissals (reviewable in district court) and jurisdictional MSPB dismissals (reviewable only in the Federal Circuit) is 'difficult and unpredictable.'" Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2010) (No. 11-184), 2011 WL 6281813, at *15 (quoting *Kloeckner*, 639 F.3d at 838). As the Government explained:

> The procedural-jurisdictional distinction rests on the premise that an appeal beyond the MSPB's jurisdiction "does not involve 'an action which the employee or applicant may appeal to the [Board]'" under Section 7702(a). But that description applies equally to an appeal, like this one, that is not timely filed. Moreover, as a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [the jurisdiction-procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

*Id.* at *15-16 (internal citations omitted).

The petitioner in *Kloeckner* agreed with the Government on this score. In her reply to the brief

in opposition, she noted that "[t]he government acknowledges that the significance of the [jurisdiction-procedure] distinction is far from clear, because determining whether an MSPB ruling was procedural or jurisdictional can be 'difficult and unpredictable.'" Reply to Brief in Opposition at 2, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6859422, at *2 (quoting Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), 2011 WL 6281813, at *15). "For example," the *Kloeckner* petitioner continued, "if the MSPB concluded that a claimant had failed to establish a prima facie case of discrimination, the Board and the Federal Circuit would apparently regard that failure as meaning the Board had no jurisdiction over the claim." *Id.* (citing *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir. 2001); *Hill v. Department of the Air Force*, 796 F.2d 1469, 1471 (Fed. Cir. 1986); *id.* at 1472-73 (Newman, J. concurring)).

The Government, for its part, returned to this point in its merits brief:

> [The jurisdiction-procedure] distinction has no basis and petitioner does not ask this Court to adopt it. The reason for creating an exception to the Federal Circuit's exclusive jurisdiction over final MSPB decisions is to allow discrimination claims to be heard in district courts. When the Board disposes of an appeal on grounds that do not touch on discrimination, that exception does not apply, *regardless of whether the decision rests on jurisdictional or procedural grounds.*

Brief of Respondent at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012)(No. 11-184), 2012 WL 2883261, at *25 n.3 (emphasis added).

Notwithstanding the fact that even the *Government* in *Kloeckner* disavowed the jurisdiction-procedure distinction, a divided panel of the Federal Circuit thereafter embraced that very distinction. In *Conforto*, that court held that cases alleging discrimination but dismissed by the MSPB on jurisdictional, as opposed to procedural, grounds are subject to exclusive review in the Federal Circuit. *See* 713 F.3d at 1115-21. The court purported to base that decision on the text of the statute. According to the Federal Circuit, a case that the MSPB dismisses on jurisdictional grounds is not a "mixed" case at all, because the Board has determined that the case is not one in which an employee "'has been affected by an action *which the employee ... may appeal*'" to the MSPB. *Id.* at 1118 (emphasis added; quoting 5 U.S.C. § 7702(a)(1)(A), App. 93a); *see also* 5 U.S.C. § 7513(d), App. 92a ("An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board ...."); *id.* § 7512, App. 90a (listing the "[a]ctions covered" by that section). "[T]he plain import of this statutory language is that a purported mixed case appeal is reviewed by a district court only if the [MSPB] has jurisdiction to decide the appeal from the adverse action in issue." *Conforto*, 731 F.3d at 1118.

But that argument, as Judge Dyk explained in dissent in *Conforto*, "was necessarily rejected in *Kloeckner*," as it "would equally give our court jurisdiction to review procedural issues in mixed cases." 713 F.3d at 1123-24. "As the government

pointed out in *Kloeckner*, an employee also may only appeal to the Board if he does so within the applicable time limits." *Id.* at 1124 (Dyk, J., dissenting); *see also Stahl v. MSPB*, 83 F.3d 409, 412-13 (Fed. Cir. 1996) (employee's untimely claim that removal was based on discrimination not appealable to the Board under § 7702(a)). The statute does not "draw any textual distinction between different types of Board decisions, and there is no other basis for distinguishing between jurisdictional and procedural dismissals." *Conforto*, 713 F.3d at 1124 (Dyk, J., dissenting). If Congress had wanted to send procedural dismissals to district court and jurisdictional dismissals to the Federal Circuit, "it could have just said so." *Kloeckner*, 133 S. Ct. at 605.

Indeed, *Conforto*'s "textual" analysis begs the question. Here, the MSPB held that it lacked jurisdiction over petitioner's appeal on the ground that he had voluntarily entered into the settlement agreement, and thereby waived his right to appeal to the MSPB. App. 26-30a. But whether or not the settlement was voluntary is the key *merits* issue in the case. There is no question that the MSPB has jurisdiction over appeals in which employees contend that a settlement implicating a major adverse employment action was involuntary. *See, e.g.*, *Conforto*, 713 F.3d at 1120 ("The employee in such cases may claim that he was forced to resign or retire in part or in whole because of discrimination by the agency ...."); *Garcia v. Department of Homeland Sec.*, 437 F.3d 1322, 1324 (Fed. Cir. 2006) (*en banc*) (a "facially voluntary action by the employee may actually be involuntary" if coerced by the agency); *Schultz v. United States Navy*, 810 F.2d 1133, 1136

(Fed. Cir. 1987) (coercion established by showing "that the agency knew that the reason for the threatened removal could not be substantiated"). In this context, in short, "the MSPB's jurisdiction and the merits of an alleged involuntary separation are 'inextricably intertwined.'" *Shoaf v. Department of Agr.*, 260 F.3d 1336, 1341 (Fed. Cir. 2001) (quoting *Schultz*, 810 F.2d at 1136); *see also Conforto*, 713 F.3d at 1126-27 (Dyk, J., dissenting).

Thus, in this very case, the MSPB assumed jurisdiction over petitioner's appeal in the first round of litigation and remanded the case to the ALJ to hold a hearing and receive more evidence. App. 59-70a. If that appeal fell within the MSPB's jurisdiction, it necessarily follows that petitioner's subsequent appeal from the decision on remand also fell within the MSPB's jurisdiction. The MSPB's resolution of a challenge to the voluntariness of a settlement cannot retroactively strip the Board of jurisdiction to address that very issue. To the contrary, it is black-letter law that an adjudicatory body does not lack jurisdiction to address a claim simply because the claim may fail on the merits. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682 (1946). In other words, the merits of petitioner's allegation that he was subjected to a major adverse employment action because the settlement was involuntary do not involve the MSPB's "jurisdiction" as this Court has defined that term, whatever label the Board chooses to affix to its decision. *See, e.g., Reed Elsevier*, 559 U.S. at 160-63; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452-56 (2004). And because the MSPB has jurisdiction to decide whether a settlement was voluntary, a case challenging the voluntariness of a settlement

implicating a major adverse employment action qualifies as "an action which the employee or applicant may appeal to the [MSPB]" 5 U.S.C. § 7702(a)(1)(A), App. 93a, *regardless* of the MSPB's resolution of that question on the merits.

The jurisdiction-procedure distinction also renders illogical other parts of the judicial review provisions. The statutory requirement for the Board to decide "mixed" cases within 120 days, *see* 5 U.S.C. § 7702(a)(1), App. 93-94a, would make no sense if there were no way to determine whether a case is "mixed" in the first place unless and until the Board resolved the claim. Rather, that timing provision underscores that the determination of whether a case is "mixed" must occur *at the time of filing*. If a claimant alleges that she has been subjected to a major adverse employment action and seeks relief under the federal anti-discrimination laws, she has brought a "mixed" case *regardless* of whether the Board accepts or rejects her allegations.

That is why, as this Court has explained, the correct forum for judicial review of an MSPB decision turns on "the nature of an employee's claim," not the basis for the MSPB's decision. *Elgin*, 132 S. Ct. at 2134. And this is not merely a technicality: Congress routed cases involving discrimination claims (*i.e.*, "mixed" cases) to district court precisely because the employee has the statutory "right" to have a discrimination claim "subject to trial de novo." 5 U.S.C. § 7703(c), App. 99a; *see also* S. Rep. No. 95-969, at 63 (1978) ("District court is a more appropriate place than the Court of Appeals for [cases involving discrimination claims] since they may involve additional fact-finding."). Civil-service

claims, in contrast, are subject to deferential review under the Administrative Procedure Act (APA), regardless of whether they are standalone claims (and thus subject to review in the Federal Circuit) or paired with discrimination claims (and thus subject to review in district court). *See, e.g.*, *Butler v. West*, 164 F.3d 634, 639 n.10 (D.C. Cir. 1999). A jurisdiction-procedure distinction that routes cases involving discrimination claims, like this one, to the Federal Circuit, and then subjects them to APA review, *see, e.g.*, *Shoaf*, 260 F.3d at 1340, "turns Congress' clear intent on its head," *Conforto*, 713 F.3d at 1127 (Dyk, J., dissenting); *see also* 5 U.S.C. § 7702(e)(3), App. 96a ("Nothing in this section shall be construed to affect the right to trial de novo" of discrimination claims).

And putting aside the lack of textual support for the jurisdiction-procedure distinction, it creates monumental practical difficulties. In particular, it forces MSPB claimants to decide whether their MSPB challenge has been dismissed on "jurisdictional" or "procedural" grounds. Many, if not most, of those claimants proceed *pro se*. *See, e.g.*, U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2017* (Feb. 2016), at 14 ("Generally, at least half or more of the appeals filed with the agency are from *pro se* appellants."), available at http://tinyurl.com/zcv6lxj (last visited Sept. 26, 2016). Even the Nation's most seasoned judges and lawyers have trouble distinguishing "jurisdictional" from "procedural" rulings. *See, e.g.*, *Reed Elsevier*, 559 U.S. at 160-61. "By contrast, a jurisdictional rule based on the type of employee and adverse agency action at issue does not involve such amorphous distinctions." *Elgin*, 132 S. Ct. at 2136.

As this Court has long recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* The plain statutory text provides an administrable bright-line rule: MSPB decisions are generally subject only to APA review in the Federal Circuit, except that MSPB decisions in cases involving discrimination claims are subject to review in district court, where the employee is entitled to a trial de novo on the discrimination claim. *See* 5 U.S.C. §§ 7703(b),(c), App. 97-99a. Period. There is no need to dissect the MSPB decision, or to engage in a metaphysical distinction between "jurisdictional" and "procedural" grounds. The fact that the D.C. Circuit was unable to determine as a ministerial matter the correct court to which to transfer this case, but found itself constrained to appoint an *amicus* to brief this jurisdictional issue, underscores that the law in this area requires clarification.

The decision below, it is worth emphasizing, did not endorse *Conforto*'s jurisdiction-procedure distinction. Rather, the decision below rested on the entirely different ground that pre-*Kloeckner* circuit precedent compelled the result in this case. *See* App. 15a (citing *Powell*, 158 F.3d at 599-600). Because *Kloeckner* did not specifically address the jurisdiction-procedure distinction, the court concluded, *Powell* remained binding circuit law. *Id.* Regardless of whether that conclusion is correct as a matter of D.C. Circuit law, this Court obviously is not similarly constrained.

And the courts of appeals are squarely divided on this issue. The D.C. Circuit and the Federal Circuit have now the joined the Second and Tenth Circuits, which held—even before *Kloeckner*—that the statute bifurcates judicial review of MSPB decisions based on a jurisdiction-procedure distinction. *See* App. 5-15a; *Conforto*, 713 F.3d at 1115-21; *Harms*, 321 F.3d at 1007-08; *Downey*, 160 F.3d at 146. The Eighth Circuit, however, specifically rejected that distinction in the decision later reversed—on other grounds—in *Kloeckner*. *See Kloeckner*, 639 F.3d at 838 (rejecting the jurisdiction-procedure distinction applied in *Harms* and *Downey* as resting on "an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions"), *rev'd on other grounds*, 133 S. Ct. 596.

In any event, a circuit conflict is not an end in itself, but a red flag signaling an issue that warrants this Court's clarification. Here, another such red flag is the fact that the Government has taken diametrically opposed positions on this precise issue in this Court in *Kloeckner* and in the lower courts in this case and in *Conforto*. If the Government cannot speak with a single voice on this issue, it is a sure sign that this Court's clarification is warranted.

Indeed, in the absence of this Court's review, it is difficult to see how this issue will ever be clarified. As noted above, the Federal Circuit has held that it has exclusive jurisdiction to review MSPB decisions in mixed cases, like this one, that are dismissed on jurisdictional grounds. *See Conforto*, 713 F.3d at 1115-21. And because the MSPB is bound by the Federal Circuit in this area, *see* 5 U.S.C. § 7703(b)(1), App. 97-98a; 28 U.S.C. § 1295(a)(9); *Elgin*, 132 S. Ct.

at 2131, the Board specifically instructs claimants whose cases are dismissed on jurisdictional grounds (like petitioner) to seek review there. *See* App. 30a ("You have the right to request review of this final decision *by the United States Court of Appeals for the Federal Circuit.*") (emphasis added). The MSPB further refers litigants to the Federal Circuit's website, and in particular to that court's "Guide for Pro Se Petitioners and Appellants." App. 31a. That document, in turn, addresses "Discrimination claims in Merit Systems Protection Board cases," and states that district courts, as opposed to the Federal Circuit, "have jurisdiction over cases involving bona fide claims of discrimination ... that were raised before *and considered by* the [MSPB]." U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants* § 6 at 167, available at http://tinyurl.com/hntdsja (last visited Sept. 26, 2016) (emphasis added). That is precisely the position that this Court rejected four years ago in *Kloeckner*.

This Court need not and should not delay review to await further percolation on a matter that the Federal Circuit has decided falls within its exclusive jurisdiction. If a claimant were to file a "mixed" case like this one in federal district court, and that court were to transfer the case to the Federal Circuit per *Conforto*, that decision would not be appealable to the regional circuit. *See, e.g.*, *Miller v. Toyota Motor Corp.*, 554 F.3d 653, 655 (6th Cir. 2009); *FDIC v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). This petition arises only by the happenstance that Perry, proceeding *pro se*, mistakenly filed in the D.C. Circuit instead of (per the MSPB's instructions) the Federal Circuit, and the D.C. Circuit decided to

appoint counsel to address the jurisdictional issue rather than simply dismissing the case or transferring it to the Federal Circuit. This petition thus provides this Court with a unique vehicle to clarify this area of the law.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition.

September 27, 2016

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
*Counsel of Record*
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
*clandau@kirkland.com*

# APPENDIX

## APPENDIX CONTENTS


D.C. Circuit Opinion,
July 22, 2016 ..... 1a

D.C. Circuit Order,
December 18, 2014 ..... 16a

D.C. Circuit Order,
August 21, 2014 ..... 18a

Merit Systems Protection Board Order,
August 6, 2014 ..... 20a

Administrative Law Judge Decision,
December 23, 2013 ..... 32a

Merit Systems Protection Board Order,
June 12, 2013 ..... 59a

Administrative Law Judge Decision,
July 30, 2012 ..... 71a

Administrative Law Judge Order,
May 7, 2012 ..... 81a

5 U.S.C. § 7512 ..... 90a

5 U.S.C. § 7513 ..... 91a

5 U.S.C. § 7702 (excerpts) ..... 93a

5 U.S.C. § 7703 (excerpts) ..... 97a

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Argued November 18, 2015

Decided July 22, 2016

No. 14-1155

ANTHONY W. PERRY,
PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD,
RESPONDENT

---

On Petition for Review of a Decision
of the Merit Systems Protection Board

---

*Rebecca Taibleson*, appointed by the court, argued the cause for petitioner. With her on the briefs were *Devin S. Anderson* and *Christopher Landau*, all appointed by the court.

*Anthony W. Perry*, pro se, filed the brief for petitioner.

*Stephen W. Fung*, Attorney, Merit Systems Protection Board, argued the cause and filed the brief for respondent.

Before: GRIFFITH, SRINIVASAN and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: When a federal agency takes a significant adverse employment action against an employee, the employee can appeal to the Merit Systems Protection Board. If the Board then rules against the employee, she can seek review of the Board's decision in a federal court. But which federal court? That is the question we confront in this case. There are two possible answers: the Federal Circuit or a federal district court.

As a general matter, Board decisions are reviewed in the Federal Circuit. An exception to that default rule arises with so-called "mixed cases." Mixed cases are ones in which an employee not only challenges an adverse action within the Board's jurisdiction but also alleges discrimination in violation of certain federal statutes. If the Board in a mixed case rules against the employee on the merits of her discrimination claim, she must seek review in district court, not the Federal Circuit.

Our court has held, though, that the mixed-case exception does not apply if the Board dismisses the employee's appeal for lack of jurisdiction without reaching the merits of her discrimination claim. In that circumstance, review lies in the Federal Circuit rather than district court. *Powell v. Dep't of Def.*, 158 F.3d 597 (D.C. Cir. 1998). This case involves exactly that situation. So in the normal course, our precedent in *Powell* would straightforwardly dictate transferring this case to the Federal Circuit.

It turns out the path is not so straightforward because of the Supreme Court's intervening decision in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012). In *Kloeckner*,

the Court held that when the Board dismisses a mixed-case appeal without reaching the merits on a procedural ground—there, untimeliness—judicial review resides in district court (as when the Board reaches the merits), not the Federal Circuit. The question we now address is whether *Kloeckner* effectively overruled our decision in *Powell*. That is, does *Kloeckner*'s result for pre-merits *procedural* dismissals eviscerate *Powell's* contrary result for pre-merits *jurisdictional* dismissals?

We find that the answer is no, and that we remain bound by our precedent in *Powell*. We therefore transfer this case to the Federal Circuit.

I.

Anthony Perry, the appellant in this case, worked for the Census Bureau until 2012. In 2011, the Bureau sent Perry a memorandum notifying him that he would be terminated because of problems with his attendance. The Bureau alleged that Perry had refused to document his hours properly and had been absent from his desk for hours at a time. Perry responded, explaining that he had an informal agreement with his supervisor allowing him to take walking breaks during the workday due to his osteoarthritis.

In August 2011, Perry entered into a settlement agreement with the Bureau. The agreement settled the disciplinary action in exchange for Perry's early retirement and his completion of a thirty-day suspension. It also required Perry to dismiss discrimination claims he had separately filed with the Equal Employment Opportunity Commission. Although Perry later expressed his desire to continue

working, he retired in April 2012 per the settlement agreement.

Perry then appealed his suspension and retirement to the MSPB. He alleged that the Bureau's complaints about his performance resulted from discrimination based on his race, age, and disability, and also constituted retaliation against him for bringing his discrimination claims. Perry further claimed that, because of the discrimination and because the Bureau had misrepresented his appeal rights, his settlement agreement with the Bureau had been coerced.

The MSPB's jurisdiction hinged on Perry's claim that the settlement had been involuntary: because the Board generally lacks jurisdiction to review voluntarily accepted actions, *see* 5 U.S.C. § 7512(1 )-(5); 5 C.F.R. § 752.401(b)(9); *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006), its jurisdiction in this case depended on the validity of Perry's contention that the settlement—and hence, the resulting suspension and retirement—had been involuntary. An administrative law judge rejected Perry's claims of coercion, finding that the retirement and suspension had been imposed pursuant to a voluntary agreement. The judge thus dismissed the case for lack of jurisdiction. The MSPB, after remanding the case once for reasons not relevant here, affirmed the dismissal for lack of jurisdiction.

Perry, proceeding pro se, filed a petition for review of the Board's dismissal in this court. We appointed an amicus curiae to present argument on whether this court has jurisdiction, and, if not, whether the case should be transferred to the Federal Circuit or a federal district court. Because Perry has fully joined

amicus's arguments on those issues, we will refer to them collectively as Perry.

II.

The question we confront is which federal court has jurisdiction to review the Board's dismissal of Perry's case. We can quickly rule out one court—ours. Although Perry initially petitioned for review in this court, he now acknowledges that this court lacks jurisdiction. The Board agrees, and so do we. The statute under which Perry initially brought the case to us, 5 U.S.C. § 7703(b)(1)(B), allows for jurisdiction in any court of appeals over cases in which the employee exclusively makes whistleblower claims. That provision, as all parties agree, has no application to this case.

Although this court lacks jurisdiction, we can transfer the case to a court in which it could have been brought originally. *See* 28 U.S.C. § 1631. And while the parties agree that the case should be transferred from here, they disagree about where it should go. Perry contends that jurisdiction to review the Board's decision lies in federal district court. The Board argues that the case instead belongs in the Federal Circuit. We conclude that our precedent requires transferring the case to the Federal Circuit.

Before turning to which court has jurisdiction to review the MSPB's decision, we briefly set out which cases can go to the Board in the first place. Not every type of adverse employment action can be appealed to the Board. Rather, to come within the Board's jurisdiction, the action must be sufficiently serious—e.g., a termination or a suspension of longer than fourteen days. *See* 5 U.S.C. §§ 7512, 7513(d). Additionally, as explained, the contested action

generally cannot have been voluntarily undertaken by the employee.

Let's assume the employee brings to the Board a case that meets those criteria and thus lies within the MSPB's jurisdiction. If the Board renders a decision against her, she may seek judicial review pursuant to the Civil Service Reform Act, 5 U.S.C. § 1101 *et seq.* As a general matter, review of Board decisions lies in the Federal Circuit. 5 U.S.C. § 7703(b)(1)(A). There is an exception to that rule for certain "[c]ases of discrimination," as to which review lies in federal district court. *Id.* § 7703(b)(2).

The statute defines the cases falling within that exception as ones in which an employee "(A) has been affected by an action which [she] may appeal to the Merits Systems Protection Board, and (B) alleges that a basis for the action was discrimination prohibited by" enumerated federal laws. *Id.* § 7702(a)(1). Such cases have come to be known as "mixed cases." *E.g.*, *Kloeckner*, 133 S. Ct. at 602, 604. The upshot is that, whereas review of MSPB decisions normally resides in the Federal Circuit, "mixed cases—those appealable to the MSPB and alleging discrimination"—"shall be filed in district court." *Id.* at 604.

But where should an employee seek judicial review in a situation in which she brought to the MSPB what she believed was a mixed case, but the Board dismissed her appeal for lack of jurisdiction upon deciding that the case was not in fact "appealable to the MSPB"? *Id.* That happened here: Perry sought review in the MSPB of a case in which he "alleg[ed] discrimination," *id.*, but the Board dismissed his appeal for lack of jurisdiction based on a conclusion

that his retirement and suspension had been voluntary.

We previously faced the same situation in *Powell v. Department of Defense*, 158 F.3d 597. There, after concerns had been raised about Lawana Powell's absences from work, she agreed to a transfer to a temporary position which expired soon thereafter. *Id.* at 597. Powell appealed to the MSPB, arguing that her separation had been involuntary and that the agency had discriminated against her. *Id.* The Board dismissed her appeal for lack of jurisdiction upon finding that her acceptance of the transfer had been voluntary. *Id.* at 597-98. She sought review in district court on the assumption that her case was a mixed case. But the district court "ruled that Powell's case was not a true mixed case because it included only a discrimination claim and not a Board-jurisdictional claim." *Id.* at 598. We agreed, holding that the Federal Circuit—not the district court—was the proper forum for Powell's appeal. *Id.* at 599-600.

*Powell* is materially indistinguishable from this case. Like Powell, Perry resolved a disciplinary issue by agreeing to a significant employment action that could be appealed to the Board if involuntary (in this case, mandatory retirement and a thirty-day suspension). Like Powell, Perry then claimed that his agreement had been involuntary due to discrimination. As in *Powell*, the Board disagreed, finding that the agreement was voluntary and thus dismissing the appeal for lack of jurisdiction. And like Powell, Perry contends that review of the Board's dismissal lies in district court. We rejected that argument in *Powell*. As a result, unless there has been some controlling change in the law in the interim, our precedent in that

case would require us to conclude that Perry's appeal, like Powell's, belongs in the Federal Circuit rather than in district court.

Perry argues that *Powell* no longer binds us because of the Supreme Court's intervening decision in *Kloeckner v. Solis*, 133 S. Ct. 596. As we have explained, "a circuit precedent eviscerated by subsequent Supreme Court cases is no longer binding on a court of appeals." *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988). "The question" for us is whether the intervening Supreme Court decision "effectively overrules, *i.e.*, 'eviscerates'" our prior precedent. *United States v. Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999) (alteration omitted) (quoting *Dellums*, 863 F.3d at 978 n.11), *abrogated on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000). Here, consequently, we ask whether *Kloeckner* "effectively overrules" or "eviscerates" *Powell*, such that *Powell* is incompatible with *Kloeckner*. We conclude it does not.

For starters, all sides agree that *Kloeckner* did not involve the precise issue raised by both this case and *Powell*. *See* Amicus Reply Br. 9-10 n.2; Respondent Br. 18-21. In the latter cases, the Board dismissed the employee's appeal for lack of jurisdiction, holding that it could not hear the appeal because the challenged action was voluntary. *See Powell*, 158 F.3d at 597-98. *Kloeckner* did not involve a jurisdictional dismissal. There was no doubt that Kloeckner alleged an adverse action within the Board's jurisdiction—she had been fired. *Kloeckner*, 133 S. Ct. at 602. The Board instead dismissed her claim on the procedural ground of untimeliness. *Id.* at 603. And each time the *Kloeckner* Court described the question before it, it specifically

defined the issue by reference to MSPB dismissals on "procedural grounds." *Id.* at 600, 602, 603, 607.

The Court did so, moreover, with awareness of the potential distinction between procedural and jurisdictional dismissals. In explaining that it had granted review to "resolve a Circuit split on whether an employee seeking judicial review should proceed in the Federal Circuit or in a district court when the MSPB has dismissed her mixed case on procedural grounds," the Court cited—as the cases making up the district-court side of the split—decisions from the Second and Tenth Circuits. *Id.* at 603 & n.3 (citing *Harms v. IRS*, 321 F.3d 1001 (10th Cir. 2003); *Downey v. Runyon*, 160 F.3d 139 (2d Cir. 1998)). And in both of those decisions, the courts of appeals had suggested a distinction between procedural and jurisdictional dismissals. *See Harms*, 321 F.3d at 1007-08; *Downey*, 160 F.3d at 145-46. In *Harms*, the Tenth Circuit expressly drew a divide between "dismissals by the MSPB on procedural ... grounds," which it held must be appealed to district court, "as opposed to [dismissals on] jurisdictional[] grounds," which under that court's precedent must go to the Federal Circuit. 321 F.3d at 1007. The Supreme Court in *Kloeckner*, aware of the Tenth Circuit's decision in *Harms*, repeatedly said that it was addressing only the proper forum for appealing MSPB dismissals on "procedural grounds."

In the oral argument in *Kloeckner*, the Justices' questions likewise manifested awareness of the potential distinction between procedural and jurisdictional dismissals. Justice Sotomayor, after noting that "[e]very circuit court unanimously holds that jurisdictional dismissals should go only to the Federal Circuit," suggested that the argument for

Federal-Circuit jurisdiction "has more legs" in the jurisdictional context because "[t]he point is that you're only permitted to go to district court on issues of discrimination that are within the Board's jurisdiction." Transcript of Oral Argument at 21-22, *Kloeckner,* 133 S. Ct. 596 (No. 11-184) (Resp. Supp. App. 22-23). Similarly, Justice Kagan—who would later author the Court's unanimous opinion—observed that there "seem[ed] to be a good deal of difference between the question, what happens to something that is clearly a mixed case, and alternatively, the question of whether something is a mixed case; that is, whether it includes a claim about an action which the employee may appeal to the MSPB." *Id.* at 23-24 (Resp. Supp. App. 24-25). She suggested that "one could think that questions about what can be appealed to the MSPB ought to go to the Federal [C]ircuit under this statutory language in a way that questions that are involved in this case do not." *Id.* at 24 (Resp. Supp. App. 25).

Of course, we do not mean to suggest that statements made in the course of questioning at oral argument can profitably be parsed for reliable indications of the speaker's position on the subject addressed. We therefore do not cite the Justices' questions during the *Kloeckner* oral argument in support of the proposition that they had necessarily decided there is a material distinction between procedural and jurisdictional dismissals (with the former appealed to district court and the latter to the Federal Circuit). Rather, the Justices' questions—like the Court's citation of the Second and Tenth Circuits' opinions—indicate something more modest: *awareness* of the possibility of such a distinction. In that light, we understand *Kloeckner*'s repeated (and consistent)

references to "procedural" dismissals to have been made in the context of awareness of an argument that jurisdictional dismissals are different.

Of course, even though *Kloeckner* involved procedural rather than jurisdictional dismissals, and even assuming the Court fashioned its decision with awareness that the distinction might be a material one, in theory the Court still might have "effectively overrule[d]" our precedent in *Powell* if its decision in fact turned out to be incompatible with *Powell*. *Williams*, 194 F.3d at 105; *see Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 664-66 (D.C. Cir. 2013). But unless *Powell* has been eviscerated in that manner, we, as a panel, have no leeway to depart from it. We find no such incompatibility here. In reaching that result, we agree with the one other court of appeals to have addressed the same issue: the Federal Circuit has held that its pre-*Kloeckner* decisions directing appeals from MSPB jurisdictional dismissals to its own court remain good law in the wake of *Kloeckner*. *Conforto v. MSPB*, 713 F.3d 1111, 1116-19 (Fed. Cir. 2013). We arrive at the same conclusion about our own parallel precedent in *Powell*.

In finding that *Powell* is not necessarily incompatible with *Kloeckner*, we focus on the statute's description of a mixed case. Recall that an appeal from an MSPB decision generally belongs in the Federal Circuit unless the case appealed from is a mixed case, in which event review lies in the district court. The statute describes a mixed case as one in which the employee both alleges discrimination and "has been affected by an action which [she] *may appeal* to the" MSPB. 5 U.S.C. § 7702(a)(1)(A) (emphasis added). *Kloeckner* thus describes "mixed cases" as "those

*appealable to the MSPB* and alleging discrimination." 133 S. Ct. at 604 (emphasis added).

The emphasized statutory language suggests a distinction between jurisdictional dismissals (like those in this case and *Powell*) and procedural dismissals (like the one in *Kloeckner*). *See Conforto*, 713 F.3d at 1118. As to the former, when an employee brings a case she believes qualifies as a mixed case to the MSPB but the Board dismisses her appeal based on a lack of jurisdiction, the Board necessarily concludes that she has not "been affected by an action which [she] may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). She instead has been affected by an action which she may *not* appeal to the MSPB. The case, in other words, turns out not to be a mixed case after all—it is not one "appealable to the MSPB." *Kloeckner*, 133 S. Ct. at 604.

When the Board dismisses an appeal on a procedural ground, however, the case may still be viewed as one in which the employee was "affected by an action which [she] may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). In such cases, the action was amenable to an appeal to the Board, but her appeal was dismissed on some procedural ground. In *Kloeckner*, accordingly, the Court said that "[n]o one here contests that Kloeckner brought a mixed case—that she was affected by an action (*i.e.*, removal) appealable to the MSPB and that she alleged discrimination." 133 S. Ct. at 604. The Board dismissed her appeal, not because the case was unappealable, but because the appeal was untimely. *Id.*

Perry argues that *Kloeckner* eviscerates any effort to distinguish between jurisdictional and procedural

dismissals on the theory that only the latter involves "an action which the employee ... may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). According to Perry, even if *Kloeckner* described mixed cases as ones "appealable to the MSPB," that language is no less applicable to appeals dismissed on procedural grounds than to appeals dismissed on jurisdictional grounds. In either case, Perry contends, the case was not "appealable to the MSPB." *See Kloeckner*, 133 S. Ct. at 604. The Federal Circuit found that argument unpersuasive. *See Conforto*, 713 F.3d at 1118 n.1. We, too, conclude that the argument does not compel finding *Kloeckner*'s result for procedural dismissals incompatible with *Powell's* result for jurisdictional dismissals.

First, jurisdictionally barred appeals differ from procedurally barred appeals because the former were never "appealable to the MSPB." *Kloeckner*, 133 S. Ct. at 604. In the latter situation, by contrast, the employee can be seen to have "been affected by an action which [she] may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). That statutory language draws attention to the contested "action," and in the case of a procedural dismissal, the *action* affecting the employee is one she can appeal to the Board. It may turn out that she brings her appeal in a procedurally deficient fashion—such as by bringing it too late—but the action itself was appealable. That is not the case with a jurisdictional dismissal.

In addition, with procedurally defective appeals, unlike jurisdictionally barred appeals, the Board can excuse the procedural error and permit the appeal to go forward. As the Federal Circuit explained, the "Board has the authority to entertain appeals that are

procedurally defective under its own regulations, but it may not hear a case over which it lacks jurisdiction." *Conforto*, 713 F.3d at 1118 n.1 (citation omitted). The applicable regulations give the Board discretion to "revoke, amend, or waive" any regulatory requirement "unless a statute requires application of the regulation." 5 C.F.R. § 1201.12; *see also* 5 C.F.R. § 1201.22(c) (enabling Board to excuse untimeliness if "a good reason for the delay is shown").

For those reasons, procedural dismissals can be understood to involve an employee "affected by an action which [she] may appeal to the Board," in a way that jurisdictional dismissals cannot. 5 U.S.C. § 7702(a)(1)(A). That suffices to show that *Kloeckner* did not necessarily overrule or eviscerate *Powell*.

Finally, Perry raises a series of arguments that equally could have been made at the time we decided *Powell*. For instance, he contends that the statute contains a number of deadlines whose effective operation would require knowing whether a case qualifies as a mixed case in advance of the Board's ultimate decision about its jurisdiction. *See, e.g., id.* § 7702(a)(2), (e)(1)(B), (e)(2). As a result, he submits, the forum for judicial review cannot vary based on the Board's eventual decision about its jurisdiction. Such a result, Perry further contends, would give rise to unwarranted uncertainty about the proper forum for judicial review. Whatever else may be true about those arguments, we have no occasion to consider them for the following reason: they gain no additional traction from the Supreme Court's decision in *Kloeckner*, and we therefore have no authority to rely on them as a basis for reconsidering our precedent in *Powell*.

The same is true of Perry's argument that it would make sense for judicial review to reside in federal district courts because jurisdictional dismissals grounded in the voluntariness of the challenged employment action (as in this case) can overlap with the merits of a discrimination claim. That contention not only could have been made in *Powell*, but we in fact specifically considered (and rejected) it. *See* 158 F.3d at 599-600. *Kloeckner* affords us no license to revisit that conclusion. Rather, we are bound to adhere to *Powell's* direction that, when the Board dismisses an appeal for lack of jurisdiction, "the boundaries of the Board's [own] jurisdiction should be subject to uniform interpretation in a single forum—the Federal Circuit." *Id.* at 600.

In short, we remain bound by *Powell*. And in accordance with our precedent in that case, we transfer this petition for review to the Federal Circuit.

*So ordered.*

# UNITED STATES COURT OF APPEALS
# FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 14-1155**
**September Term, 2014**

**MSPB-DC-0752-12-0486-B-1**
**MSPB-DC-0752-12-0487-B-1**

**Filed On:** December 18, 2014

Anthony W. Perry,
Petitioner

v.

Merit Systems Protection Board,
Respondent

**BEFORE:** Henderson*, Srinivasan, and Millett, Circuit Judges

## ORDER

Upon consideration of the court's order to show cause filed August 21, 2014; petitioner's response and supplemental response thereto, which include motions for relief from judgment; respondent's reply and response, which requests the case be transferred to the United States Court of Appeals for the Federal Circuit; and petitioner's reply, it is

**ORDERED** that the order to show cause be discharged. It is

---

* Judge Henderson would grant the respondent's request to transfer the case to the Federal Circuit.

**FURTHER ORDERED** that the parties, while not otherwise limited, address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. § 7703(b)(1)(B); and (2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2). It is

**FURTHER ORDERED** that

Rebecca Taibleson
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, DC 20005

a member of the bar of this court, be appointed as amicus curiae to present arguments in favor of petitioner's position. It is

**FURTHER ORDERED** that petitioner's motions for relief be referred to the merits panel to which this petition is assigned. The parties are directed to address in their briefs any relevant issues presented in the motions rather than incorporate those arguments by reference.

The Clerk is instructed to enter a briefing schedule and calendar this case for presentation to a merits panel.

**Per Curiam**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 14-1155**
**September Term, 2013**

**MSPB-DC-0752-12-0486-B-1**
**MSPB-DC-0752-12-0487-B-1**

**Filed On:** August 21, 2014

Anthony W. Perry,
Petitioner

v.

Merit Systems Protection Board,
Respondent

## ORDER

Upon consideration of the petition for review and because the docketing fee has not been paid, it is, on the court's own motion.

**ORDERED** that, by September 22, 2014, petitioner either pay the $500 docketing fee to the Clerk, U.S. Court of Appeals for the District of Columbia Circuit, or file with this court a motion for leave to proceed in forma pauperis. *See* Attachments. It is

**FURTHER ORDERED** that, by September 22, 2014, petitioner show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a)(9) (Federal Circuit has exclusive jurisdiction over appeal from final order or decision of Merit System Protection Board). The

response may not exceed 20 pages. Failure of petitioner to comply with this order will result in dismissal of this case for lack of prosecution. *See* D.C. Cir. Rule 38.

The Clerk is directed to send a copy of this order to petitioner by certified mail, return receipt requested and by first class mail.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

# UNITED STATES OF AMERICA
# MERIT SYSTEMS PROTECTION BOARD

**Docket Numbers: DC-0752-12-0486-B-1, DC-0752-12-0487-B-1**

**DATE: August 6, 2014**

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

## THIS FINAL ORDER IS NONPRECEDENTIAL[1]

*Anthony W. Perry.* Upper Marlboro, Maryland, pro se.
*Tyree P. Ayers.* Esquire, Washington, D.C., for the agency.

## BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

## FINAL ORDER

¶ 1 The appellant has filed a petition for review of the initial decision, which dismissed for lack of jurisdiction his suspension and involuntary retirement appeals because of a settlement agreement entered into before the U.S. Equal Employment Opportunity

---

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

Commission (EEOC). Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

¶ 2 In August 2011, the appellant and the agency entered into a settlement agreement before the EEOC wherein the appellant agreed, inter alia, to voluntarily resign or retire no later than September 4, 2012, to serve a 30-day suspension which the agency would issue in lieu of effectuating a removal action it proposed in June 2011, and to waive his Board appeal rights with respect to the aforementioned actions. MSPB Docket No. DC-0752-12-0486-I-1 (0486-1), Initial Appeal File (IAF), Tab 14, Subtab 1 at 15-20. After he served the 30-day suspension and retired pursuant to the settlement agreement, the appellant filed an appeal with the Board regarding the 30-day

suspension and his retirement, which he alleged was involuntary. 0486-1, IAF, Tab 1 at 6, ¶ 20; MSPB Docket No. DC-0752-12-0487-I-1 (0487-1), IAF, Tab 1 at 5, ¶ 20.

¶ 3 The administrative judge docketed the suspension and involuntary retirement claims as two separate appeals and later dismissed both appeals without a hearing,[2] finding that the Board lacked jurisdiction because the appellant validly waived his Board appeal rights in the August 2011 settlement agreement. 0486-I, Initial Decision (July 30, 2012); 0487-I, Initial Decision (July 30, 2012).

¶ 4 The appellant then filed petitions for review of the aforementioned initial decisions. 0486-I, PFR File, Tab 1; 0487-I, PFR File, Tab 1. The Board joined the two appeals and granted the appellant's petitions for review. 0486-I, Remand Order (June 12, 2013). The Board found that the appellant's claim, that the agency coerced him into signing the settlement agreement by misinforming him that he would not have Board appeal rights if it effectuated his removal, constituted a nonfrivolous allegation of involuntariness entitling him to a jurisdictional hearing. Remand Order at 6-7. Thus, the Board remanded the appeals for a jurisdictional hearing, so that the appellant would have an opportunity to explain, and present evidence in support of, that nonfrivolous allegation. Remand Order at 9. The appellant raised several other claims of coercion—i.e., that the agency coerced him into

---

[2] The administrative judge concluded that the appellant waived his right to a hearing, in part because of conflicting statements the appellant made, but we ultimately concluded that the appellant did not waive his right to a hearing. *See* 0486-I, Remand Order (June 12, 2013).

signing the settlement agreement by threatening to remove him, by proposing adverse action that was discriminatory and that it knew it could not sustain, and by failing to inform him of his Board appeal rights—all of which the Board considered and rejected. Remand Order.

¶ 5 On remand, the administrative judge conducted a hearing, at which the appellant declined to testify. MSPB Docket Nos. DC-0752-12-0486-B-1 and DC-0752-12-0487-B-1 (0486-B), Remand File (RF), Tab 26, Hearing Compact Disc (HCD), Track 4; *see* 0486-B, RF, Tab 28, Remand Initial Decision (RID). The administrative judge thereafter issued an initial decision, again dismissing the appeals for lack of jurisdiction based on the August 2011 settlement agreement. The appellant then filed the instant petition for review, again arguing that he did not voluntarily enter into the settlement agreement. 0486-B, Remand Petition for Review (RPFR) File, Tab 12.

¶ 6 As an initial matter, the appellant seeks to invalidate the settlement agreement by arguing that: (1) the settlement agreement is invalid because it contains a nondisclosure provision, purportedly restricts his ability to communicate with Congress and the Office of Special counsel, and required him to waive his "non-waivable" rights under Title VII; (2) he did not receive any consideration under the settlement agreement for waiving his rights under Title VII; (3) he signed the settlement agreement under duress because the agency presented him with the agreement immediately after proposing his removal; (4) the agency coerced him into signing the settlement agreement by proposing an action which it knew it could not sustain; and (5) the deciding official

intentionally withheld her decision on the proposed removal, which mitigated the proposed removal to a 30-day suspension, in order to coerce the appellant into signing the settlement agreement. *Id.* We will not consider these arguments because they all exceed the scope of the Board's remand order, some have already been raised before the Board and rejected, and some are being raised for the first time.[3] *See Zelenka v. Office of Personnel Management*, 110 M.S.P.R. 205, ¶ 15 n.3 (2008) (refusing to address an appellant's arguments which exceeded the scope of the issues to be addressed on remand), *rev'd on other grounds*, No. 2009-3065 (Fed. Cir. 2010); *see also Sanchez v. Department of Justice*, 14 M.S.P.R. 79, 82 (1982) (the presiding official properly limited the scope of the hearing to those issues discussed in remand order, where the appellant was granted a fair opportunity on his initial appeal to present the issues he attempted to litigate at the remand hearing); *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time

---

[3] On July 23, 2014, the appellant filed a request to submit evidence which he contends is new and material. 0486-B, RPFR File, Tab 17 at 3. Specifically, he seeks to submit a letter by the U.S. House of Representative's Committee on Science, Space, and Technology, as well as a report of investigation regarding the agency's Inspector General's alleged failure to remove two employees who coerced other employees into signing a nondisclosure agreement. *Id.* He also states that the Inspector General is, as a result, under investigation for retaliation and questionable hiring practices. *Id.* The appellant's request is DENIED. As previously stated, the appellant's claims regarding the validity of the settlement agreement are outside the scope of our remand order. Further, as explained in more detail below, the merits of his appeal are not before us because we do not have jurisdiction in this matter.

in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

¶ 7 On remand, the appellant again alleged that the agency misled him by stating that he would have no right of appeal if the agency removed him. 0486-B, RF, Tab 20 at 18. However, he presented no evidence regarding this issue, which was the sole issue to be addressed on remand, and does not raise any such argument on review. The evidence in the record contradicts the appellant's claim that the agency misled him with respect to his potential appeal rights. The agency attorney who assisted in negotiating and drafting the settlement agreement,[4] a management official who represented the agency during negotiations, and the appellant's union representative who assisted the appellant during negotiations, all testified that: (1) they did not advise the appellant that he would not have appeal rights if he failed to sign the settlement agreement and the agency removed him; and (2) they were not aware of anyone at the agency who so informed the appellant. HCD, Track 3. The appellant's union representative testified that he informed the appellant that he (the appellant) could

---

[4] The administrative judge noted in the initial decision that, according to the agency's attorney, the parties continued discussing settlement even after they reached an impasse before an EEOC settlement judge in or around April 2011. RID at 8; *see* 0486-I, IAF, Tab 5. The appellant argues that no additional communication occurred until after the agency provided him with the proposed settlement agreement. 0486-B, RPFR File, Tab 12 at 5, 13. Assuming arguendo that the administrative judge misstated these facts, such an error would be irrelevant to the question of whether the agency provided the appellant with misinformation regarding his potential appeal rights.

choose not to sign the terms of the settlement agreement, "take[] the punishment" the agency selected, and then file a union grievance or an appeal with the Board. *Id.* Further, the union representative testified that he believed the appellant "knew exactly what he was signing." *Id.* We also note that, according to the union representative, he and the appellant jointly devised retirement as a possible settlement term, and this term was later proposed to the agency.[5] *Id.* The union representative's testimony is consistent with contemporaneous notes of the deciding official regarding a conversation she had with the appellant after the agency proposed his removal, wherein he stated that he was "willing to make any concession to remain employed until September 2012," when he would be "eligible to retire at 30 years." 0486-B, RF, Tab 21 at 12.

¶ 8 The administrative judge found the aforementioned witnesses' testimony credible, noting that: (1) all of the witnesses corroborated each other's testimony on every major point and their testimony was consistent in all material respects with the documentary evidence of record; (2) the witnesses' testimony at the hearing was straightforward, genuine and believable, and their demeanor gave no indication of dissembling; and (3) the appellant offered no plausible reason why these witnesses would fabricate

---

[5] The appellant claims that he was unaware that the agency proposed settlement terms to his representative, that his representative did not provide him with any assistance, and that his representative did not propose any alternatives and informed him that he would be removed if he did not sign the settlement agreement. 0486-B, RPFR File, Tab 12 at 6. None of these arguments are relevant to the limted jurisdictional issue in this appeal.

their testimony. RID at 13. We must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing, and may overturn such determinations only when there are "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). We discern no basis to disturb the administrative judge's credibility determinations in this case. Based on the foregoing, we find that the appellant has failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because the appellant validly waived his appeal rights therein.

¶ 9 The appellant alleges that the administrative judge committed several errors in adjudicating his appeal on remand, including: (1) failing to consider whether the agency proved its charges; (2) denying him discovery of documents from the deciding official regarding the proposed removal and her decision to sustain the charges, as well as other documents relating to "current & past misconduct" and "other causes for action against" him, and information regarding other employees' time and attendance; (3) denying his request for two witnesses—his first- and second-line supervisors—to testify regarding his time and attendance; and (4) exhibiting bias in favor of the agency and abusing his discretion by not sanctioning the agency for its failure to comply with the acknowledgement order and considering the agency's request to remove medical documentation from the record. 0486-B, RPFR File, Tab 12 at 5, 7-9.

¶ 10 The merits of the agency's charges are not at issue in this appeal because the appellant has not established the Board's jurisdiction over it. *See Evans v. Department of Veterans Affairs*, 119 M.S.P.R. 257, ¶ 5 (2013) (the Board must first resolve the threshold issue of jurisdiction before proceeding to the merits of an appeal). We therefore find that the administrative judge acted properly in not reaching, and in denying the appellant's discovery requests which all relate to, the merits of the agency's charges.[6] Regarding the appellant's request to call his first- and second-line supervisors as witnesses, we note that the administrative judge did not deny this request, but rather, the appellant withdrew it. 0486-B, RF, Tab 22 at 5, Tab 25 at 2; *see* HCD, Track 1 (the appellant did not object to the prehearing conference summary, insofar as it stated that he withdrew his request for his first- and second-line supervisors to testify). In any event, testimony regarding the appellant's time and attendance is irrelevant as it relates to the merits of the agency's charges, so we discern no error or harm.[7]

---

[6] We also agree with the administrative judge that the appellant failed to comply with the Board's procedures regarding discovery, and that his discovery requests could therefore have been denied on that basis. *See* 0486-B, RF, Tab 25 at 3. In particular, the appellant submitted his discovery requests directly to the administrative judge, rather than to the agency. *See* 0486-B, RF, Tab 8 at 3-4, Tab 14 at 3; *see also* 5 C.F.R. § 1201.71 (discovery requests and responses thereto are not to be filed in the first instance with the Board).

[7] The appellant attaches evidence which he contends is new and was previously unavailable because he received it via a Freedom of Information Act request. 0486-B, RPFR File, Tab 12 at 6. Specifically, he submits time and attendance records for the time period when he was charged with receiving pay for time not worked in the proposal notice, and Standard Form 50s

As to the appellant's assertion that the administrative judge was biased, he has not overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). The administrative judge stated below that he did not suggest to the agency's representative that he would delete any information from the appellant's pleadings and, moreover, "grant[ed] the appellant's motion to not delete any documents he submitted." 0486-I, IAF, Tab 26 at 3; *see* 0486-I, IAF, Tab 21 (the appellant's opposition to the agency's alleged request to have "all of the medical documents removed from [his] response file"). Further, even if the agency failed to submit documentation relating to the merits of its charges, the appellant has not suffered any harm because such information does not relate to the threshold issue of jurisdiction in this matter, and the administrative judge's decision not to sanction the agency for failing to produce irrelevant evidence does not establish bias.

¶ 11 The appellant raises claims of discrimination on various bases under Title VII. 0486-B, RPFR File, Tab 12 at 4-5, 10, 13. As explained in our remand order, wherein we specifically addressed the appellant's claim that the proposed removal action was motivated by discriminatory animus, the Board may consider Title VII discrimination claims only after a

---

documenting his suspension, reassignment, and retirement pursuant to the settlement agreement, as well as various performance awards he has received. *Id.* at 6, 17-46. These documents are not material, as they have no bearing on the Board's jurisdiction over this appeal. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (alleged new evidence must be of sufficient weight to warrant an outcome different from that in the initial decision).

finding of jurisdiction is made. 0486-I, PFR File, Tab 9 at 9-10 n.10; *see Cruz v. Department of the Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) (en banc). To the extent that the appellant is attempting to raise an affirmative defense, we clarify that the Board has no authority to consider affirmative defenses where it cannot hear an appeal on its merits because it lacks jurisdiction to do so. *See Martin v. Department of Defense*, 70 M.S.P.R. 653, 657 (1996). Moreover, contrary to the appellant's contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it. 0486-B, RPFR File, Tab 12 at 4; *see Conforto v. Merit Systems Protection Board*, 713 F.3d 1111, 1118 (Fed. Cir. 2013) (a case is mixed only if the Board has jurisdiction to decide the employee's appeal from the adverse action at issue); *see also Cunningham v. Department of the Army*, 119 M.S.P.R. 147, ¶¶ 8, 13-14 (2013) (providing notice of non-mixed appeal rights because although the appellant alleged that her termination was based on disability discrimination, she did not have the right to appeal her termination to the Board because she failed to make a nonfrivolous allegation of jurisdiction).

**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD: /s/
William D. Spencer
Clerk of the Board

Washington, D.C.

# UNITED STATES OF AMERICA
# MERIT SYSTEMS PROTECTION BOARD
# WASHINGTON REGIONAL OFFICE

**Docket Numbers: DC-0752-12-0486-B-1, DC-0752-12-0487-B-1**

**DATE: December 23, 2013**

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

*Anthony W. Perry*. Upper Marlboro, Maryland, pro se.
*Adam Chandler*, Esquire, Washington, D.C., for the agency.

## BEFORE

Daniel Madden Turbitt
Administrative Judge

## INITIAL DECISION

On April 25, 2012, Anthony W. Perry filed appeals with the Board, challenging his 30-day suspension and alleging that his retirement from the Department of Commerce was involuntary.

Previously, on July 30, 2012, I dismissed both appeals for lack of jurisdiction. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752- 12-0486-I-1 & DC-0752-12-0487-I-1 (Initial Decisions, July 30, 2012). On September 6, 2012, the appellant filed petitions for review of my decisions with the Board. On June 12, 2013, the Board granted the appellant's petitions for review, joined the two appeals, and remanded them to the Washington Regional Office for further adjudication. *Perry v. Department of Commerce*, MSPB

Docket Nos. DC-0752-12-0486-B-1 & DC-0752-12-0487-B-1 (Remand Order, June 12, 2013).

For the reasons set forth below, I find that the appellant failed to prove that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals, which thereby precludes the Board from adjudicating this matter. Therefore, I find that this appeal must be dismissed for lack of jurisdiction.

## ANALYSIS AND FINDINGS

Factual Background

The appellant was employed at the agency's Census Bureau as an Information Technology Specialist, GS-2210-14/08. By letter dated June 7, 2011, the Telecommunications Office's Assistant Division Chief, Daren J. Gutschow, informed the appellant of his proposed removal, based on the appellant's alleged receipt of pay for time not worked (62 specifications) and failure to follow supervisory directives (15 specifications). Appeal File (AF), Tab 11; AF, Tab 14, Subtab 1 (at 1-12).[1]

The appellant orally replied to the proposed removal. In addition, on June 30, 2011, he and his designated representative, Johnny T. Zuagar, the President of the American Federation of Government Employees, Local 2782, submitted a written response

---

[1] The records in these matters are nearly identical. Thus, unless otherwise noted, all citations herein are to the record in DC-0752-12-0486-I-1 and DC-0752-12-0486-B-1. There are three main parts to the record, one pertaining to the original appeal, cited as "Appeal File," or "AF" another pertaining to the petition for review file, cited as "Petition for Review File," or "PFR File," and the last part is to the record on remand, or "Remand File."

to the proposal letter. AF, Tab 8. The last section of the appellant's written response contains a settlement offer, in which he suggested that he would serve a 14-day suspension in lieu of a removal and would repay the agency "for the portion of hours" the agency deemed warranted for when he was absent but was paid. *Id.* at 4.

On July 25, 2011, Benjamin Felder, the Chief of the Census Bureau's Labor Relations Branch, presented a written settlement counter-offer to Zuagar.

The counter-offer contained the following material terms, in which the agency wanted the appellant to agree to:

- Retire/resign no later than May 30, 2012.
- Not apply for or accept any future positions with the Census Bureau.
- Not engage in any future misconduct.
- Accept a 60-day suspension.
- Accept a reassignment.
- Accept a demotion to a non-supervisory GS-13 position.
- Withdraw all pending complaints/cases against the agency.
- Not file a claim against the agency concerning this matter.

Between August 16, 2011 and August 22, 2011, the appellant, his representative, and several agency officials, executed a settlement agreement resolving several of the appellant's EEO complaints, which was then submitted to the Equal Employment Opportunity Commission (EEOC) Administrative Judge on August

22, 2011. AF, Tab 14, Subtab 1 (at 14-20). The settlement agreement's terms provided, in pertinent part, that in lieu of removal, the appellant would serve a 30-day suspension and voluntarily retire (or, failing that, voluntarily resign) no later than September 4, 2012. *Id.* (at 15-18). The agreement also agreed that, assuming the appellant did not engage in any misconduct from between the times when he settled and until when retired or resigned, his disciplinary record would be expunged. *Id.* (at 18).

More specifically, provision 1 of the agreement states in relevant part that:

> The parties ... voluntarily enter into this Settlement Agreement .... to resolve all existing matters concerning Complainant's[2] employment with the Agency .... By this Agreement, the parties resolve all disputes between them concerning Complainant's employment with the Agency, regardless of the forum, in existence on the effective date of this Agreement.

Under provision 2 of the agreement, the appellant agreed in pertinent part to:

a. Retire voluntarily effective no later than September 4, 2012. Complainant acknowledges that by entering into this Agreement his decision to retire is both voluntary and irrevocable.

b. Voluntarily resign from his employment with the Agency, effective September 4, 2012, in the

---

[2] The settlement agreement refers to the appellant as "the Complainant," given that the parties resolved the matter while they were litigating several EEO complaints.

event Complainant has not retired by ... September 4, 2012 ....

c .... [V]oluntarily waive all appeal rights he has and not to litigate in any forum, judicial or administrative, any claims arising from a removal ...

d. Refrain from engaging in any acts of misconduct from the effective date of this Agreement until his retirement or resignation, which will be no later than September 4, 2012 ....

e. Serve a suspension for thirty (30) calendar days in lieu of the removal proposed on June 7, 2011, for receipt for time not worked and failure to follow supervisory directive. The suspension will ... begin[ ] [on] Saturday, August 27, 2011.

f. Accept, at the Agency's sole discretion, a reassignment from the effective date of this Agreement until his retirement or resignation, which will be no later than September 4, 2012 ....

g ....

h. **WAIVER.** Waiver, release, and forever discharge the Agency, its officers, agents, employees, and representatives ... from any claims, demands, or causes of action, which Complainant has or may have, arising from his employment, including issues related [to—a listing of several formal EEO complaints]. Complainant specifically waives any and all rights and claims arising out of the issues raised in the above-cited formal complaints of discrimination and/or [any] related ... action. Complainant waives any and all rights and

> claims arising from Complainant's employment under the Age Discrimination in Employment Act ..., the Rehabilitation Act ..., and/or Title VII of the Civil Rights Act ..., as applicable. This release includes but is not limited to a release of any right to administrative, judicial, or congressional relief, or any other type of relief, or of any claim to back pay, attorneys' fees and costs, or other type of compensation, except what is specifically set forth [elsewhere in the settlement agreement]. However, by entering into this Agreement, Complainant does not waive rights or claims that may arise after the effective date of the Agreement.

*Id.*

According to provision 8 of the agreement, the appellant stated that he had read and understood "the entire agreement," "especially the provisions relating to the withdrawal of the formal complaint(s), thereby foreclosing further litigation on the matters raised in the formal complaint(s), and the waiver set forth in Paragraph 2." The appellant also agreed that he "signed this Agreement voluntarily and was in no way coerced." *Id.*

On August 26, 2011, consistent with the settlement agreement, the agency issued a decision letter that mitigated the appellant's proposed removal to a 30-day suspension. The agency, in its decision letter, determined that "the reason for the proposed removal [was] fully supported by the evidence" but that a "lesser penalty" of a 30-calendar day suspension would suffice to "deter such misconduct in the future." AF, Tab 12; AF, Tab 14, Subtab 3 (at 1).

On March 29, 2012, the appellant signed and submitted a retirement application, in which he checked the boxes that state he wished to apply for separation under the following conditions: "Voluntary Early Retirement," and "VSIP."[3] The agency approved the appellant's early retirement application on April 2, 2012. AF, Tab 15, Exhibit 4b, at 12.

On April 25, 2012, the appellant appealed to the Board, asserting that he "was coerced to sign the EEOC Settlement Agreement forcing [him] to involuntary [sic] retire ... and [serve] a 30-day suspension." AF, Tab 1 (MSPB Form 185-2, Answer to Question 6). He argued that an agency management official, a Human Resources official, and the agency's attorney made him sign the agreement by threatening that if he did not, he would be removed. *Id.* (MSPB Form 185-4A, Continuation Sheet, Answer to Question 1). He also claimed that the agency discriminated against him on the basis of his race, age, and disability, and that the employment actions were done in reprisal for his prior EEO activity. AF, Tabs 1-2. I docketed the appeal of the alleged involuntary retirement as MSPB Docket No. DC-0752-12-0487-I-1, and the appeal challenging the 30-day suspension penalty as MSPB Docket No. DC-0752-12-0486-I-1.

In response to my Orders regarding Board jurisdiction, the appellant contended that he was "forced to sign [the settlement agreement] under the threat of termination[,] as the agency used misinformation, misrepresentation of the information,

---

[3] VSIP stands for "Voluntary Separation Incentive Program," which means the appellant was entitled to receive a cash incentive of $25,000, or a severance pay amount when he retired. AF, Tab 15, Exhibit 4b at 12.

coercion, and the threat of termination to secure [his] signature involuntarily." AF, Tab 14 at 1. He further stated that the agency "committ[ed] a procedural error because [he] was not informed that all suspensions greater than 14-days are appealable as an adverse action and that [he] had appeal rights."[4] *Id.* He also alleged that he was coerced into settling because the agency "knew it could not sustain" the charges brought against him. *Id.*

On July 30, 2012, I issued two initial decisions, dismissing both appeals for lack of jurisdiction. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752-12-0486-I-1 & DC-0752-12-0487-I-1 (Initial Decisions, July 30, 2012). The appellant petitioned for review of my decisions. For the first time on petition for review, the appellant claimed that the agency informed him that he would not be able to appeal his removal to the Board if he refused to sign the EEOC settlement agreement.

The Board granted the appellant's petitions, joined the appeals, and remanded them for further adjudication, including a jurisdictional hearing. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752-12-0486-B-1 & DC-0752-12-0487-B-1 (Remand Order, June 12, 2013).

---

[4] To the extent that the appellant is asserting that the agency improperly failed to inform him of a right to appeal the 30-day suspension, the settlement agreement provides that he waived his right to challenge that action (and his retirement). Therefore, I find the agency had no obligation to provide the appellant with appeal rights concerning actions he agreed to serve pursuant to a settlement. *Clark v. U.S. Postal Service*, 989 F.2d 1164 (Fed. Cir. 1993).

The Board, in its Remand Order, held that the appellant made a non-frivolous allegation of involuntariness, inasmuch as the agency supposedly coerced him into settling based on misrepresentations that his only alternative to being removed was to accept the terms of the settlement and that, if he refused to sign the agreement, then he would relinquish his appeal rights. *Id.* at 6-7. Therefore, the Board remanded the appeal for a jurisdictional hearing on these issues.[5]

Testimony at the hearing on remand

A. *Allegation that the agency coerced the appellant into settling.*

The appellant asserted in his pleadings that the agency coerced him into signing the settlement agreement.[6]

At the hearing,[7] Ronda J. Brown testified that she was the attorney representing management during the litigation of the appellant's EEO complaints. She said that she drafted the settlement agreement. She emphasized that the agency did not force the appellant to sign the agreement. She explained that the parties

---

[5] The Board also ruled in its Remand Order that the appellant failed to raise a non- frivolous allegation that he was coerced into settling based on his argument that the agency knew it could not substantiate the charges contained in the proposal letter. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752-12-0486-I-1 & DC- 0752-12-0487-I-1 (Remand Order, June 12, 2013) at 5-6. As a result of the Board's holding, that issue is not properly before me.

[6] I approved the appellant as a witness, but on the day of the hearing, he chose not to testify.

[7] The compact diskette containing the hearing tapes is located in the record at Remand File, Tab 26.

had extensive settlement discussions during the EEO process. In fact, she remembered that the parties specifically asked for, and received, a Settlement Judge to assist them with settlement negotiations. AF, Tab 5 (April 5, 2011 letter from the appellant to EEOC Administrative Judge Mary E. Palmer, titled "Preparation For Settlement Discussion.") Brown indicated that the parties reached an impasse after meeting for several hours with the Settlement Judge.

Brown testified that the parties continued talking about settlement even after working with the Settlement Judge, however. She noted, for instance, that the agency issued an email to the appellant on May 19, 2012, which set forth various settlement proposals. She recalled that, once the parties came to resolution, the appellant and the union carefully read the entire settlement agreement before they both signed it.

Terryne F. Murphy, Chief, Information Systems Support and Review Office, testified that she was the deciding official in the appellant's proposed removal action. She stated that the agency did not force the appellant into agreeing to settle. She recalled that on June 15, 2011, about a week after the appellant received a copy of the notice of proposed removal, he came to her office and offered a number of options to try and resolve his pending discrimination complaints because he told her "he did not want to be fired." She said she listened to him without responding to his offers because she "did not know what to say to him" at that juncture. Murphy stated that she drafted a memorandum less than one hour after she spoke with the appellant summarizing their conversation. AF, Tab 21, Exhibit 1 at 2. She reviewed the memorandum

and confirmed that it was an accurate reflection of their discussion. She indicated that, according to her notes, the appellant offered to be demoted and said that he was "willing to make any concession to remain employed until September 2012. This will be the time that he is eligible to retire at 30 years." *Id.* She added that, subsequently, the appellant submitted a written reply to the notice of proposed removal, in which he offered several other alternatives to try and informally resolve the matter. *Id.*, Exhibit 2 at 1-6.

Stacey Chalmers, the Chief of the Census Bureau's Employee Relations Branch, testified that she met with Murphy, the deciding official, to assist in the action to remove the appellant. She indicated that the agency did not coerce the appellant into resolving his appeal. She said that he had other options; for instance, he could have chosen to fight the removal action or resign.

Benjamin Felder, a Labor Relations Officer in the Census Bureau's Human Resources Office, denied that the appellant was coerced into settling. Felder testified that he had "extensive" settlement discussions with the appellant and Zuagar, the appellant's union representative. Felder recalled drafting an email to the appellant and his representative, in which he clarified that certain matters were "not negotiable." He recounted that one of the most important of these issues was that, if the appellant did settle, then he must agree to retire or resign no later than May 2012. Felder said that there was "a lot of back and forth" between the parties on approving particular language before the settlement was finalized. He indicated that the appellant always could have chosen not to settle

and instead opted to contest the possible removal and wait for "the disciplinary process to play itself out."

John T. Zuagar testified that he was the appellant's union representative and he participated in settlement talks with management on behalf of the appellant. According to Zuagar, the appellant entered into the settlement agreement of his own volition. Zuagar indicated that the appellant, after consulting with him and other union officials, submitted a written response to the notice of proposed removal and offered settlement options in his written reply. Zuagar disagreed with the appellant's characterization of the parties' settlement discussions as being "non-negotiable," given that the union successfully bargained to get the appellant additional time to remain in a work status until he retired, from May 2012 (the date the agency proposed) until September 2012 (the date the union proposed). He recounted that, when the settlement agreement was being drafted, the appellant and the union closely read and "went over" every section of the agreement until it was "well known" to both parties. Zuagar said it was his understanding that the appellant "knew what he was doing" before he executed the agreement. He stated that the appellant and the union thought that signing the agreement "was the best way to go" under the circumstances. Zuagar noted that the appellant was not coerced because, if he wished, he could have chosen to reject the settlement offer and allow the disciplinary action to "go forward" and challenge it. In fact, Zuagar specifically recalled talking to the appellant about considering settling instead of litigating the removal action and possibly risk losing his case before the Board.

B. *Allegation that the agency forced the appellant to retire as part of the settlement.*

Next, the appellant argued that the agency forced him to retire as part of a settlement. He asserted that language contained in the agreement, which states that his decision to retire would be "voluntary" and "irrevocable," are mutually exclusive terms, demonstrating that he was pushed into retiring against his will.

At the hearing, Brown, Murphy, Felder, and Chalmers all testified that under paragraph 2a of the settlement agreement, it clearly states that the appellant's retirement would be both "voluntary" and "irrevocable." They disagreed with the appellant's argument that a retirement cannot be both "voluntary" and "irrevocable" at the same time. They explained that, by signing the agreement, the appellant willingly agreed to retire and also agreed to not revoke his retirement before it became effective. They noted that, generally speaking, an individual may still revoke his or her retirement, even after submitting a retirement application with the Office of Personnel Management (OPM), so long as the revocation is made prior to the effective date of the retirement. Here, the appellant completed Part E of the Standard Form 52 attached to the settlement agreement, which the agency used to process his retirement. The appellant also submitted his retirement application to OPM.

Zuagar explained that it was the union, and not management, that recommended having the appellant retire pursuant to a settlement and so it was not something management forced upon the appellant, as he claimed. Zuagar testified that he believed the terms "voluntary" and "irrevocable" were not mutually

exclusive and stated that the appellant's retirement could be both without it being coerced.

C. *Allegation that the agency made misrepresentations to the appellant to induce him to settle.*

The appellant, moreover, contended that the agency made misrepresentations to him upon which he detrimentally relied in agreeing to settle.

At the hearing, Brown, Murphy, Chalmers, and Felder testified that the agency did not make any misrepresentations to the appellant in order to induce him to settle. They added that the waiver provision (provision 2h) of the agreement plainly states that the appellant would waive his appeal rights if he settled. They stated that the agreement did not misrepresent the appellant's appeal rights and did not violate Title VII of the 1964 Civil Rights Act, because the last sentence of paragraph 2h clearly states that he would not be waiving any *future* appeal rights, as he alleged. They testified that, to the best of their knowledge, no one ever told the appellant that he would lose his right to appeal his removal to the Board, should he fail to sign the agreement.

Brian E. McGrath, the Associate Director for Information Technology, testified that he never made any misrepresentations to the appellant to induce him to settle and he was unaware that any misrepresentations occurred. He said, in fact, that he never spoke to the appellant or his representative during the negotiations leading up to the settlement agreement. McGrath indicated that he was genuinely surprised that the appellant alleged misrepresentation, given that on September 23, 2011, or approximately one month after the parties settled, the appellant sent

McGrath an email in which he wrote that he "wanted to sincerely thank [McGrath] for allowing [him] to stay on until Sept[ember]. I don't know if this is appropriate ... but [I] wanted you to know I am thankful." AF, Tab 8, Subtab 1 at 21.

Zuagar testified that no one made any misrepresentations to the appellant in order to induce him to settle. Zuagar confirmed that the appellant agreed to waive his right to appeal under the settlement agreement. He pointed out that provision 2h explicitly sets forth that the appellant would waive his right to challenge the removal action. Zuagar disagreed with the appellant's assertion that the waiver provision in the settlement was illegal because he had to waive future appeal rights. He pointed out that, under the agreement, the appellant agreed to waive all present claims, but not any possible future EEO discrimination complaints, as is clearly spelled out in the agreement. Zuagar indicated that, during settlement negotiations, he and the appellant discussed that this would be a "global settlement," meaning that the appellant would agree "to resolve all outstanding issues at one time." Zuagar said he also explained to the appellant during their talks what his rights were and which rights he would relinquish under the agreement. Zuagar described the appellant as "smart" and so the appellant definitely understood what he was doing. Zuagar stated that he never heard anyone tell the appellant that he would lose his appeal rights if he refused to sign the settlement agreement.

The appellant voluntarily entered into the settlement agreement without fraud, coercion, and/or misrepresentation.

A party challenging the validity of a settlement agreement bears a heavy burden of showing a basis for invalidating it. *Bynum v. Department of Veterans Affairs*, 77 M.S.P.R. 662, 665 (1998). I find that the appellant here failed to meet this heavy burden and he did not establish that the settlement agreement is invalid due to fraud, coercion, or misrepresentation.

Based on my review of the documentary and testimonial evidence, I find that there is sufficient evidence to show that the parties entered into a valid, enforceable settlement agreement. I conclude that, according to the testimony provided and the relevant terms of the settlement agreement, the appellant's removal was mitigated to a 30-day suspension and later, a voluntary retirement. The agreement specifically notes that the appellant read and understood the terms of the settlement, that he entered into it willingly and knowingly, and that he agreed to waive his right to challenge the possible removal action.

The assertions made by the appellant, who argued that the settlement agreement was coerced, differed in material respects from the testimony of every witness at the hearing, including that of his own union representative. I find these witnesses credibly testified that the agreement was freely reached by the parties, that no fraud, coercion or misrepresentation occurred, and that the appellant understood the terms and conditions of the settlement, including the waiver provision and that he freely agreed to a reduced penalty and retirement pursuant to the agreement.

*See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (opportunity and capacity to observe the event or act in question, lack of bias, contradiction of the witness' version of events by other evidence or its consistency with other evidence, inherent improbability, and demeanor). I also find the testimony of these witnesses to be more credible than the sworn and unsworn statements the appellant filed in his pleadings. All of the witnesses corroborated each other's testimony on every major point and their testimony was consistent in all material respects with the documentary evidence of record. In addition, the witnesses' testimony at the hearing was straightforward, genuine, and believable, and their demeanor gave no indication of dissembling. The appellant also offered no plausible reason why these witnesses would fabricate their testimony, other than his bare assertions that they were harassing him.

The appellant's statements, on the other hand, were not corroborated by any other person on the most significant points. I also find that the appellant's assertions of agency impropriety are self-serving and ring hollow. Furthermore, I find it inherently improbable that the appellant did not understand the settlement language or that he was under duress to sign the agreement or retire. The undisputed record shows that the appellant is highly educated, literate, articulate, and he occupied a high-level government position, meaning that he definitely had the capacity to fully comprehend everything he was agreeing to when he settled. I also find no merit to the appellant's contention that a retirement cannot be both "voluntary" and "irrevocable" at the same time. I also see this argument for what it truly is—a feeble attempt on his part to distract us from the plain terms of the

agreement that clearly reflect he willingly agreed to retire, especially in light of the fact that either he or the union originally came up with the idea.

Likewise, the fact that he frequently consulted with his representative prior to signing belies his alleged failure to understand the terms of the agreement. He and his representative also met with management officials to discuss their concerns about the agreement and they exchanged emails and letters on the subject. AF, Tab 14, Subtab 1 (at 20), Subtab 3 (at 1), Subtab 8 (at 8-16); Tab 15, Subtab 4a. If the appellant is telling the truth that he did not understand certain provisions of the agreement, and I doubt that he is, then the agency supplied him with ample exchanges to clarify any questions he might have entertained. Similarly, if the appellant really did not comprehend or felt pressured into entering the agreement, then he always had the choice to delay signing it even longer or refusing to sign it altogether. *See Candelaria v. U.S. Postal Service*, 31 M.S.P.R. 412, 413 (1986) (to establish that a settlement was fraudulent as a result of coercion or duress, a party must prove that he involuntarily accepted the other party's terms, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts). The appellant's assertions of fraud, coercion, and confusion also are contradicted by the clear, straightforward language contained in the agreement. As a result, I find the hearing testimony of the witnesses to be far more credible than the appellant's sworn and unsworn statements.

In addition, it is undisputed that the agency provided the appellant with a significant amount of time in which he could contemplate whether or not he

wanted to enter into the agreement. Such a lengthy time to consider a settlement agreement cannot be deemed coercive. *Frizzell v. Department of Air Force*, 53 M.S.P.R. 413 (1992) (employee's allegation that agency did not afford him sufficient time to review settlement did not warrant setting aside that agreement, where record reflected that settlement was the result of negotiations which took place with employee's active participation over a 30-day period).

I find that just because the appellant "was faced with an inherently unpleasant situation or his choice [was] limited to two unpleasant alternatives" did not make his choice involuntary. *Parrott v. Merit Systems Protection Board*, 519 F.3d 1328, 1334-35 (Fed. Cir. 2008) (citing *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984)). Similarly, I find that even though the appellant was presented with a difficult choice when he had to sign the settlement agreement, neither the choice itself nor the circumstances under which it was made were the result of any improper agency actions.

In light of these facts, I find that the appellant failed to meet his burden of proving that the agency engaged in bad faith, fraud, coercion, or misrepresentation before he signed the settlement agreement. *See Miller v. Department of Health and Human Services*, 41 M.S.P.R. 385, 391-92 (1989); *see generally* Restatement of Contracts § 312 (1932). For all of the above reasons, I must conclude that the parties entered into a valid, enforceable agreement. I also must conclude that the appellant voluntarily agreed to serve a 30-day suspension and then retire pursuant to that agreement, and that he knowingly

agreed to waive his appeal rights as part of that settlement.

The Board lacks jurisdiction over this appeal.

Because the parties entered into a settlement agreement and the appellant chose to settle the matter by agreeing to a lesser discipline and retirement, those courses of action are presumptively voluntary and therefore divest the Board of jurisdiction over the underlying matter. *Swink v. U.S. Postal Service*, 111 M.S.P.R. 620, ¶ 9 (2009). The language of the agreement indicates that the appellant clearly and unequivocally waived his right to file a Board appeal of the removal action. *See Mays v. U.S. Postal Service*, 995 F.2d 1056, 1059 (Fed. Cir. 1993). Similarly, nothing in the settlement agreement expressly preserved the appellant's right to appeal the removal action to the Board.[8] *Perry v. U.S. Postal Service*, 78 M.S.P.R. 272, 276-77 (1997). Consequently, I conclude that the Board lacks jurisdiction over this appeal and it must be dismissed.

---

[8] I deny the appellant's July 15, 2013 "motion to provide the title and reason for every returned document in the Petition for Review File ... and the Initial Appeal File." First, no pleadings were returned in the initial appeal file. Second, the Clerk of the Board provided the appellant with explicit reasons for why the Board rejected his pleadings on petition for review, *see* Petition for Review File, Tab 8, and so I need not reiterate those reasons here. Also, although I did not explicitly state this in my August 6, 2013 Order and Summary of PrehearingConference, another reason I denied the appellant's motion to compel and "motion for discovery" on remand is because he sought information on personnel matters that occurred years before his proposed removal and that had nothing to do with the delineated narrow issue defined by the Board in these proceedings.

Finally, to the extent that the appellant raises claims of reprisal for EEO activity and discrimination based on his age, race, and disability, the Board lacks jurisdiction absent an otherwise appealable action. Allegations of prohibited personnel practices under 5 U.S.C. § 2302(b) are not an independent source of Board jurisdiction. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

## DECISION

The appeal is DISMISSED.[9]

FOR THE BOARD: /s/
Daniel Madden Turbitt
Administrative Judge

[9] Because the case is dismissed for lack of jurisdiction, I need not address the appellant's allegations that the agency: did not properly consider the *Douglas* factors in assessing the penalty of removal, or allegedly denied him due process when it proposed his removal. Also, given my jurisdictional determination, the appellant's November 26, 2013 "Request for an Immediate Decision on the Merits" is denied.

## NOTICE TO APPELLANT

This initial decision will become final on **January 27, 2014,** unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

## BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

**Criteria for Granting a Petition or Cross Petition for Review**

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading

and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the *earlier* date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the

petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(l).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

**NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and *Forms* 5, 6, and 11.

# UNITED STATES OF AMERICA
# MERIT SYSTEMS PROTECTION BOARD

**Docket Numbers: DC-0752-12-0486-I-1, DC-0752-12-0487-I-1**[1]

**DATE: June 12, 2013**

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

## THIS ORDER IS NONPRECEDENTIAL[2]

*Anthony W. Perry*. Upper Marlboro, Maryland, pro se.
*Adam Chandler*, Esquire, Washington, D.C., for the agency.

## BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

## REMAND ORDER

The appellant has filed petitions for review in these cases asking us to reconsider the initial decisions

---

[1] The records in these matters are virtually identical. Thus, unless we expressly indicate otherwise, all citations herein are to the record in DC-0752-12-0486-I-1.

[2] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

issued by the administrative judge, which dismissed the appellant's appeals for lack of jurisdiction due to a settlement agreement entered into before the U.S. Equal Employment Opportunity Commission (EEOC). For the reasons discussed below, we GRANT the appellant's petitions for review, JOIN the two appeals, and REMAND these cases to the Washington Regional Office for further adjudication in accordance with this Order.[3]

## BACKGROUND

On June 7, 2011, the agency proposed the appellant's removal from his GS-14 Information Technology Specialist position for "Receipt of Pay for Time not Worked" and "Failure to Follow Supervisory Directive." Initial Appeal File, MSPB Docket No. DC-0752-12-0486-I-1 (IAF-0486), Tab 14, Subtab 1 at 1-12. Between August 16, 2011 and August 22, 2011, the appellant, his representative, and several agency officials, executed a settlement agreement resolving several of the appellant's EEO complaints, which was then submitted to the EEOC administrative judge on August 22, 2011.[4] *Id.* at 14-20.

---

[3] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[4] The appellant incorrectly contends that "the Administrative Judge makes a misstatement of fact in stating that the ... EEO Settlement Agreement was reached before the EEOC." Petition for Review File, MSPB Docket No. DC-0752-12-0486-I-1 (PFR File-0486), Tab 1 at 4. The settlement agreement bore an EEOC caption and, once fully executed, was submitted to the EEOC administrative judge. IAF-0486, Tab 14, Subtab 1 at 14-15.

The settlement agreement stated that the parties entered into it "voluntarily" to "resolve all disputes between them concerning [the appellant's] employment with the Agency, regardless of the forum, in existence on the effective date of th[e] Agreement." *Id.* at 15. As part of the agreement, the parties agreed that the appellant would "[s]erve a suspension for thirty (30) calendar days in lieu of the removal proposed on June 7, 2011."[5] *Id.* at 16. Further, the appellant agreed to "[r]etire voluntarily effective no later than September 4, 2012." *Id.* at 15.

Consistent with the settlement agreement, on August 26, 2011, the agency issued a decision on the proposed removal, finding that "the reason for the proposed removal [wa]s fully supported by the evidence" but that a "lesser penalty" of a 30 calendar day suspension would be sufficient to "deter such misconduct in the future." *Id.*, Subtab 3 at 1-2. Then, on March 29, 2012, the appellant submitted an application for "voluntary early retirement," which the agency approved on April 2, 2012. IAF-0486, Tab 15 at 12.

On April 25, 2012, the appellant filed an appeal with the Board, challenging his alleged involuntary retirement and suspension for more than 14 days. IAF-0486, Tab 1 at 6, ¶ 20; Initial Appeal File, MSPB

---

[5] We disagree with the appellant's claim that the agency "did not provide any document to [him] stating that the 30-day suspension was a mitigation of any adverse action [it] took or threatened to take against [him]." PFR File-0486, Tab 1 at 3. The EEO settlement agreement plainly stated that "[i]n consideration," the agency would not remove the appellant based upon the charges outlined in the proposal to remove and would issue a decision on the proposal to remove, suspending the appellant for 30 days. IAF-0486, Tab 14, Subtab 1 at 17.

Docket No. DC- 0752-12-0487-I-1 (IAF-0487), Tab 1 at 5, ¶ 20. The administrative judge then docketed the involuntary retirement appeal as MSPB Docket No. DC-0752-12-0487-I-1 and the adverse action (30-day suspension) appeal as MSPB Docket No. DC-0752-12-0486-I-1. *See* IAF-0486, Tab 28 at 1 n.*; *see also* IAF-0487, Tab 28 at 1 n.*. In response to the administrative judge's Orders regarding Board jurisdiction, the appellant filed identical submissions in each appeal, contending that he was "forced to sign [the settlement agreement] under the threat of termination [,] as the agency used misinformation, misrepresentation of the information, coercion, and the threat of termination to secure [his] signature involuntarily." IAF-0486, Tab 14 at 1; IAF-0487, Tab 14 at 1. He further stated that the agency "committ[ed] a procedural error because [he] was not informed that all suspensions greater than 14-days are appealable as an adverse action and that [he] had appeal rights." IAF-0486, Tab 14 at 1; IAF-0487, Tab 14 at 1. He also alleged that he was coerced because the agency "knew it could not sustain" the charges brought against him. IAF-0486, Tab 14 at 2; IAF-0487, Tab 14 at 2.

The administrative judge subsequently issued his initial decisions dismissing the appeals for lack of jurisdiction, without holding a hearing, finding that the appellant had validly waived his appeal rights via the EEOC settlement agreement. IAF-0486, Tab 28, Initial Decision (ID); IAF-0487, Tab 28. Thus, he found that the appellant could not appeal his 30-day suspension, and that the appellant's retirement was not involuntary, because he voluntarily agreed to these actions pursuant to the settlement agreement. IAF-

0486, Tab 28, Initial Decision (ID) at 4-5; IAF-0487, Tab 28 at 4-5.

In his petition for review, the appellant argues that he was entitled to an evidentiary hearing on the issue of jurisdiction because he made a non-frivolous allegation of involuntariness.[6] PFR File-0486, Tab 1 at 5. He cites to *Schultz v. United States Navy*, 810 F.2d 1133 (Fed. Cir. 1987), claiming that the agency "knew it could not substantiate or sustain" the charges against him. *Id.* at 2-4, 11-12. Further, he alleges that he entered into the settlement agreement because the agency provided him with "misinformation with regard to [his] due process rights and MSPB appeal rights" and "stat[ed] that there were no appeal rights." *Id.* at 5-6.

---

[6] The appellant alleges that the administrative judge abused his discretion and exhibited bias in favor of the agency. PFR File-0486, Tab 1 at 7-10. An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). We see no such evidence in the record.

The appellant also seems to suggest that he was coerced into signing the settlement agreement because his alternative was removal. *See* PFR File-0486, Tab 1 at 6, 10. To the extent the appellant is making this argument, it must fail. An appellant's choice between unpleasant alternatives, including the threat of removal, is insufficient to set forth a nonfrivolous allegation of involuntariness. *Lee v. Office of Personnel Management*, 23 M.S.P.R. 403, 406 (1984).

## ANALYSIS

The appellant's claim that the agency knew it could not substantiate his proposed removal does not constitute a nonfrivolous allegation of coercion.

Regarding the appellant's claim that the agency knew its actions against him could not be sustained, the Board has held that an appellant may show coercion by demonstrating that the agency believed its proposed adverse action could not be substantiated, or that there was no arguable basis for the proposed action. *Bahrke v. U.S. Postal Service*, 98 M.S.P.R. 513, ¶12 (2005); *see Schultz*, 810 F.2d at 1136 (a threatened action is "purely coercive" if "the agency knew that the reason for the threatened [action] could not be substantiated").

There is no evidence that such circumstances are present here. Charge 1 of the proposed removal related to the appellant's alleged receipt of pay for time not worked on several dates between October 2010 and May 2011. IAF-0486, Tab 14, Subtab 1 at 1-10. In his written reply, the appellant admitted to his ongoing absences from the workplace, though he attempted to explain them, noting that he took "extended lunch periods;" took breaks to walk, stretch, or "reclin[e] in [his] car" due to his medical condition; and, spent time in his car working on his EEO cases. *Id.*, Subtab 2 at 2. Further, he conceded that several of the specifications noted in Charge 1 were attributable to "failed communications between [him] and [his] supervisor," including the appellant forgetting to complete leave requests and/or "correct time and attendance for leave taken." *Id.* at 2-3. Charge 2 concerned the appellant's alleged failure, on several dates between April 2011 and May 2011, to follow his

supervisor's directive to sign in and out on the attendance log. *Id.*, Subtab 1 at 10-11. The appellant's written reply indicated that, despite being aware of this directive, the appellant did not begin signing in and out until his supervisor responded to his requests for an explanation "regarding th[is] change in procedure," sometime after he received the June 7, 2011 proposed removal notice. *Id.*, Subtab 2 at 3. Based on the appellant's own statements, there appears to have been at least some basis for the proposed discipline.

The appellant made a non-frivolous allegation of involuntariness.

An appellant may establish that the Board has jurisdiction over an action taken pursuant to the terms of a settlement agreement wherein he agreed to waive his appeal rights if he can establish that the agreement was invalid due to misrepresentation by the agency.[7] *Simmons v. Small Business Administration*, 115 M.S.P.R. 647, ¶ 11 (2011). A showing that a reasonable person would have been misled by the agency's statements is sufficient to show misrepresentation. *Hazelton v. Department of Veterans Affairs*, 112 M.S.P.R. 357, ¶ 11 (2009).

The appellant alleged that he was coerced into signing the settlement agreement under "threat of

---

[7] We discern no basis in this matter to distinguish between settlement agreements entered into before the Board and agreements entered into in other forums. *Swink v. U.S. Postal Service*, 111 M.S.P.R. 620, ¶ 9 (2009), *aff'd*, 372 F. App'x 90 (Fed. Cir. 2010) ("[T]he Board will review the terms of a settlement agreement and the surrounding circumstances to determine if it retains jurisdiction over an appeal of an action that was settled in another procedural avenue.").

termination at the Agency's sole discretion." IAF-0486, Tab 14 at 1. He further alleged that the agency provided him with "misinformation," "misrepresented]" information, and did not inform him "that [he] had appeal rights."[8] *Id.* The appellant's allegations can be fairly interpreted to mean that the agency advised him that his only alternative to termination was to accept the terms of the settlement agreement and indicated that he would not otherwise have appeal rights. Indeed, on review, the appellant reiterates that the agency provided him with "misinformation with regard to [his] due process rights and MSPB appeal rights" and "stat[ed] that there were no appeal rights." PFR File-0486, Tab 1 at 5-6; *see* IAF-0486, Tab 14 at 1. We therefore find that the appellant made a nonfrivolous allegation of involuntariness sufficient to warrant a jurisdictional hearing. If the appellant is able to prove his allegation that the agency provided him with misinformation upon which he detrimentally relied in signing the settlement agreement (namely, that he would not otherwise have appeal rights), this would demonstrate that he did not enter into the agreement voluntarily. *See Gutierrez v. U.S. Postal Service*, 90 M.S.P.R. 604, ¶ 9 (2002) (finding that the appellant's allegation that the agency incorrectly "told him that, if he did not resign and the agency followed through with

---

[8] To the extent the appellant alleges that the agency was required to notify him of his appeal rights before he signed the settlement agreement, this is incorrect. An agency is not obligated to notify an employee of his Board appeal rights until it "issues a decision notice ... on a matter that is appealable to the Board." 5 C.F.R. § 1201.21; *Gingrich v. U.S. Postal Service*, 61 M.S.P.R. 583, 587 (1995) (stating that an agency is obligated to notify an employee of his Board appeal rights when it takes an appealable action).

its proposal to remove him, he would not have appeal rights with regard to the removal action" constituted a "nonfrivolous allegation that his resignation was involuntary").

We remand these cases for a jurisdictional hearing.

As stated previously, the administrative judge dismissed the appellant's appeals for lack of jurisdiction without holding a hearing. ID. However, where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over an appeal, he is entitled to a jurisdictional hearing. *Ferdon v. U.S. Postal Service,* 60 M.S.P.R. 325, 329 (1994). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Id.* While an appellant may waive his right to a hearing, the waiver must be clear, unequivocal, informed, and decisive. *Oneisom v. Department of the Air Force,* 102 M.S.P.R. 386, ¶ 6 n.2 (2006). We have already determined that the appellant's claim of misrepresentation constitutes a nonfrivolous allegation of Board jurisdiction. Further, as discussed below, we find that the appellant did not waive his right to a jurisdictional hearing.

In his initial appeal form, the appellant requested a hearing. IAF-0486, Tab 1 at 3. However, on May 3, 2012, the appellant submitted a letter to the administrative judge waiving his right to a hearing. *Id.,* Tab 4 at 1. On May 7, 2012, the administrative judge issued an Order scheduling a close of record conference, which he believed would be "beneficial," given that "the appellant waived his right to a hearing and stated that he preferred to have a decision based on the written record." *Id.,* Tab 6 at 1. On

June 1, 2012, in a letter providing his contact information for the close of record conference, the appellant stated that he believed he had a right to a jurisdictional hearing although he waived his right to a hearing on the merits and requested that the administrative judge clarify this issue during the close of record conference. *Id.*, Tab 17 at 1.

The administrative judge then held a conference with the parties on June 4, 2012. *Id.*, Tab 26. During the conference, the appellant asked that his hearing request be reinstated only as to the issue of jurisdiction and the administrative judge then clarified the difference between the issues of jurisdiction and the merits. *Id.* at 3. Subsequently, apparently because he understood the administrative judge's explanation to mean that a "hearing on the issue of jurisdiction is one and the same as the hearing on the merits of the case" and that he could not have a "hearing on jurisdiction alone,"[9] the appellant sent a letter to the administrative judge on June 4, 2012, declining a hearing on jurisdiction. *Id.*, Tab 20 at 1, Tab 25 at 1.

On June 18, 2012, in his response to the agency's opposition to various motions he filed, the appellant again stated that he withdrew his request for a hearing based on this understanding, reiterated his prior request for a "hearing on the issue of jurisdiction only,"

---

[9] The administrative judge contends that this is "not an accurate reflection of what [he] said." He explained that "although the issues of jurisdiction and the merits are different ... [he] would not bifurcate the hearing on just the question of whether the appellant raised nonfrivolous allegations concerning jurisdiction." IAF-0486, Tab 26 at 3 n.2. Rather, "if [he] deemed it appropriate to go forward with a hearing, [he] would listen to testimonial evidence on all matters (the jurisdictional issues as well as the merits)." *Id.*

and requested that the administrative judge "provide the documentary evidence that precludes the appellant from the right of a hearing on the issue of jurisdiction alone." *Id.*, Tab 25 at 1. On June 26, 2012, the administrative judge issued his summary of the June 4, 2012 conference, granting the appellant's request to waive the hearing. *Id.*, Tab 26 at 3. The administrative judge's summary of the conference afforded the parties the opportunity to make an oral objection, or motion to supplement, by a date certain if they disagreed with the summary. *Id.* at 5. The appellant timely submitted a motion to supplement stating, in relevant part, "other cases make it clear that the issue of jurisdiction are separate issues as you state and that the appellant has the right to a hearing on the matter of jurisdiction alone, which is what I am seeking." *Id.*, Tab 27 at 5.

In sum, we find that the appellant did not waive his right to a hearing. The pleadings and communications in the record reflect that the appellant repeatedly stated that he wished to have a jurisdictional hearing. *See generally* IAF-0486, Tabs 17, 20, 25-27. Further, the appellant timely objected to the administrative judge's summary of the June 4, 2012 conference, again stating that he was seeking a jurisdictional hearing. IAF-0486, Tab 27 at 5. Thus, the administrative judge erred in proceeding to dismiss the appeals on jurisdictional grounds without a hearing. ID.

We remand these cases for a jurisdictional hearing, so that the appellant may have an opportunity to

explain, and present evidence in support of, the above-noted nonfrivolous allegation.[10]

## ORDER

For the reasons discussed above, we REMAND this case to the Washington Regional Office for further adjudication in accordance with this Remand Order.

FOR THE BOARD: /s/
William D. Spencer
Clerk of the Board

Washington, D.C.

---

[10] The appellant argues that the administrative judge should have considered his argument that the proposed removal action was motivated by discrimination and retaliation under Title VII. PFR File-0486, Tab 1 at 2-3. However, the Board may consider a claim of discrimination under Title VII only after a finding of jurisdiction is made. *Cruz v. Department of the Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) (en banc) ("The Board has not been granted jurisdiction over Title VII claims ... unaccompanied by an appealable action over which the Board does have jurisdiction."); *see Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000) (the Board must first address the matter of jurisdiction before proceeding to the merits of the appeal).

# UNITED STATES OF AMERICA
# MERIT SYSTEMS PROTECTION BOARD
# WASHINGTON REGIONAL OFFICE

**Docket Number: DC-0752-12-0487-I-1***

**DATE: July 30, 2012**

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

*Anthony W. Perry*, Upper Marlboro, Maryland, pro se.
*Adam Chandler*, Esquire, Washington, D.C., for the agency.

## BEFORE

Daniel Madden Turbitt
Administrative Judge

## INITIAL DECISION

On April 25, 2012, Anthony W. Perry filed an appeal with the Board, challenging his 30-day suspension and alleging that his retirement from the Department of Commerce was involuntary. For the reasons below, this appeal is DISMISSED for lack of jurisdiction.

Background

The appellant was employed at the agency as an Information Technology Specialist, GS-2210-14/08. By letter dated June 7, 2011, Assistant Division Chief

---

* This docket number pertains to the appellant's claim of involuntary retirement. His companion appeal, pertaining to his 30-day suspension, is docketed at DC-0752-12-0486-I-1.

Daren J. Gutschow notified the appellant of his proposed removal, based on the appellant's alleged receipt of pay for time not worked and failure to follow supervisory directives that required him to use the workplace attendance log. Appeal File (AF), Tab 14, Subtab 1 (at 1-12). The parties reached settlement of that proposed termination action at the Equal Employment Opportunity Commission (EEOC) and executed a settlement agreement on August 22, 2011. *Id.* (at 14-20). The terms of the settlement agreement provided, in pertinent part, that in lieu of removal, the appellant would serve a 30-day suspension and voluntarily retire (or, failing that, resign) no later than September 4, 2012. *See id.* (at 15-18). Assuming the appellant did not engage in any misconduct between that time and his retirement, the agency agreed that it would also expunge his record. *Id.* (at 18). On August 26, 2011, the agency issued a decision letter that mitigated the appellant's proposed removal to a 30-day suspension. AF, Tab 14, Subtab 3 (at 1).

The appellant filed the instant appeal with the Board on April 25, 2012, averring that he "was coerced to sign the EEOC Settlement Agreement forcing [him] to involuntary [sic] retire ... and [serve] a 30-day suspension." AF, Tab 1 (MSPB Form 185-2, Answer to Question 6). He also claimed that the agency discriminated against him on the basis of his race, age, and disability, and that the employment actions were reprisal for his prior EEO activity. *Id.*

The appellant has failed to prove by preponderant evidence that the Board has jurisdiction over this appeal.

The jurisdiction of the Board is not plenary in nature; rather, it is limited to actions designated as

appealable to the Board under any law, rule or regulation. 5 U.S.C. § 7701(a); *see also Martinez v. Merit Systems Protection Board*, 126 F.3d 1480, 1482 (Fed. Cir. 1997). The Board's jurisdiction is determined at the time the appeal is filed. *Gillespie v. Department of Defense*, 90 M.S.P.R. 327, ¶ 7 (2001); *Castro v. U.S. Postal Service*, 51 M.S.P.R. 530, 532 (1991). The appellant has the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2)(i). Preponderance of the evidence is defined by regulation as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

Based on the record before me, I find that this appeal is not within the Board's jurisdiction. First, to the extent the appellant argues that the agency has breached the settlement agreement, that is an enforcement issue that the appellant must pursue through the EEOC. This Board has authority to enforce the terms of a settlement agreement where the agreement has been accepted into the record of a Board appeal. *See, e.g., Wobschall v. Department of the Air Force*, 43 M.S.P.R. 521, 523 (1990); *Kinney v. Department of the Interior*, 30 M.S.P.R. 170, 171-72 (1986). Here, however, the settlement agreement was not reached during the course of an appeal to the Board, and, therefore, was not made part of a Board record. *See Wobschall*, 43 M.S.P.R. at 523 (the Board has no authority to enforce settlement agreement reached during grievance). Thus, the Board has no authority to enforce the terms of this settlement agreement, and if the appellant seeks enforcement of the agreement, he must pursue it through the EEOC (through the agency's

Office of Civil Rights), as stated in part 7 of the agreement. *See* AF, Tab 14, Subtab 1 (at 18-19).

Second, the Board lacks jurisdiction over this appeal because by signing the EEOC settlement agreement, the appellant waived his appeal rights in the instant matter. Part 1 of the settlement agreement states that "[b]y this Agreement, the parties resolve all disputes between them concerning the Complainant's employment with the Agency, regardless of the forum, in existence on the effective date of this Agreement." AF, Tab 14, Subtab 1 (at 15).

With regard to the appellant's 30-day suspension, I also find that the Board lacks jurisdiction because the appellant agreed to the suspension voluntarily. The settlement agreement itself, which was signed by the appellant, states that it was "voluntarily enter[ed] into." AF, Tab 14, Subtab 1 (at 15). The appellant, however, claims that the agency "misrepresent[ed] the information" during the settlement process and "used ... the threat of termination to secure [his] signature involuntarily." AF, Tab 14 (at 1). He also alleges that he was coerced into accepting the agency's settlement terms because his other option was to accept the possibility of a removal. *See id.* However, the appellant has provided no evidence that tends to show misrepresentation or coercion, and, in fact, the record shows that during the settlement process his interests were represented by Johnny T. Zuagar, the president of the appellant's union. *See* AF, Tab 14, Subtab 1 (at 20), Subtab 3 (at 1); Tab 15, Subtab 4a. The appellant's belief that he had to choose between two unappealing options (possible removal and the settlement terms) does not amount to coercion on the part of the agency, nor does it vitiate the voluntariness of the settlement agreement. *See, e.g., McCorcle v. Department of*

*Agriculture*, 98 M.S.P.R. 363, 371 (2005); *see also Smitka v. U.S. Postal Service*, 66 M.S.P.R. 680, 687 (1995) (the mere fact that an employee is faced with unpleasant alternatives does not render his choice of one of those alternatives involuntary), *aff'd*, 78 F.3d 605 (Fed. Cir. 1996) (Table). Though the appellant would have faced the possibility of removal had he decided to forego settlement, there is no evidence to suggest that the agency used the possible termination as a threat to elicit his signature on the settlement agreement. Finally, it bears noting that in his response to the agency's letter of proposed removal, the appellant himself suggested settlement terms that included a suspension (albeit one of 14 days). AF, Tab 14, Subtab 2 (at 5). Because I find that the appellant voluntarily agreed to the 30-day suspension in question, the appellant has no right to appeal the action and thus the Board does not have jurisdiction over that part of his appeal.

With regard to the appellant's claim of involuntary retirement, I likewise conclude that the Board lacks jurisdiction over the matter because, as I determined above, the appellant voluntarily entered into the settlement agreement that required him to retire. Yet, even if the Board had jurisdiction to address the appellant's retirement, there is nothing in the record to suggest that the retirement was involuntary. On the contrary, the record shows that by signing the settlement, the appellant agreed to "[r]etire voluntarily effective no later than September 4, 2012." AF, Tab 14, Subtab 1 (at 15). Moreover, on March 29, 2012, the appellant submitted an application for the Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Pay (VSIP) plans. AF, Tab 15, Subtab 4b. On this form, the appellant attested to the

voluntary nature of his retirement and agreed, as part of VSIP, to accept a cash incentive of either $25,000 or an amount equal to the severance pay to which he would be entitled. *Id.* The fact that the appellant specifically applied for a "Voluntary Early Retirement" and stood to gain a financial benefit by retiring undercuts his argument that his retirement was involuntary. I therefore conclude, based on the record before me, that even if the Board had jurisdiction over the appellant's claim of involuntary retirement, said claim would fail on the merits.

Finally, to the extent that the appellant raises claims of reprisal for EEO activity and discrimination based on his age, race, and disability, the Board lacks jurisdiction absent an otherwise appealable action. Allegations of prohibited personnel practices under 5 U.S.C. § 2302(b) are not an independent source of Board jurisdiction. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

## DECISION

For the reasons stated above, the appeal is DISMISSED.

FOR THE BOARD: /s/
Daniel Madden Turbitt
Administrative Judge

## NOTICE TO APPELLANT

This initial decision will become final on **September 3, 2012** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

## BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision,

supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the *earlier* date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The

date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

**JUDICIAL REVIEW**

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and *Forms* 5, 6, and 11.

## NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

# UNITED STATES OF AMERICA
# MERIT SYSTEMS PROTECTION BOARD
# WASHINGTON REGIONAL OFFICE

**Docket Number: DC-0752-12-0487-I-1**

**DATE: May 7, 2012**

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

---

**This document contains important information about this appeal and its processing. Please read the entire document carefully.**

---

**There are questions whether this appeal is within the Board's jurisdiction. As a result, the Board might dismiss the appeal for lack of jurisdiction without addressing the merits of the case. This Order provides necessary information concerning the jurisdictional issue and steps the appellant must take to show that the Board should not dismiss the appeal for lack of jurisdiction.**

## ORDER ON JURISDICTION AND PROOF REQUIREMENTS OVER INVOLUNTARY ACTIONS

The appellant's petition for appeal claims an involuntary retirement or resignation. I **ORDER** the parties to follow the procedures set out below. If either party has a question about any of the case processing instructions in this Order, you may telephone this office at the phone number listed at the end of the Order for assistance.

## NOTICE TO THE APPELLANT

The Board may not have jurisdiction to decide an appeal from the kind of action you are challenging. Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board. I will dismiss your appeal, therefore, unless you make a non-frivolous allegation that you resigned or retired because of duress, coercion, or misrepresentation by the agency. If you are asking for a hearing, one will be held only if you support your claim with affidavits or other evidence of facts which, if proven, could show that your retirement or resignation was involuntary because of duress, coercion, or misrepresentation. Conclusory, vague, or unsupported allegations are not enough to meet this standard.

Specifically, you must make detailed factual allegations that one of the following things happened to you: (1) The agency made misleading statements on which you relied to your detriment; or (2) under all of the circumstances the agency made your working conditions so difficult because of discrimination or another reason that a reasonable person in your position would have felt compelled to resign or retire; or (3) you sought to withdraw your retirement or resignation prior to its effective date and the agency did not have a valid reason for not allowing its withdrawal; or (4) your resignation or retirement was the product of mental incompetence, or was secured in violation of the law; or (5) if you resigned or retired after the agency proposed to remove you, you may prove your claim by showing that the agency knew that the reason for the threatened removal could not be substantiated. Retirement after the agency issued its

decision to remove you, however, does not raise a question of voluntariness, and instead allows the Board to consider the merits of the removal.

If you make a non-frivolous allegation supported by affidavits or other evidence that your retirement or resignation is within the Board's jurisdiction, you must then establish that the Board has jurisdiction over your appeal by proving the same matters by preponderant evidence. You will be provided the opportunity to do this either at a hearing or during a further opportunity for the parties to develop the written record. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a disputed fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2). In other words, you must show that it is more likely than not that you were prevented from making a voluntary decision to resign or retire in one of the ways listed above.

The Board lacks jurisdiction over claims of prohibited discrimination that are not made in connection with a matter that is appealable to the Board. Thus, if you claim that discrimination caused you to resign or retire, I may only address that claim insofar as it is relevant to the issue of involuntariness. Only if you eventually prove that the Board has jurisdiction over your resignation or retirement may I then consider the merits of your discrimination claim under the standards of the applicable antidiscrimination statute.

I **ORDER** you to file evidence and/or argument amounting to a non-frivolous allegation that your claim of involuntary resignation or retirement is within the Board's jurisdiction. Your submission must be filed

within 10 calendar days of the date of this Order, and you must serve a copy of it on the agency at the same time. The agency may file a response on this jurisdictional issue within 20 calendar days of the date of this Order. Unless I tell the parties otherwise, the record on this issue will close on the date the agency's response is due. That means I will not accept any more evidence or argument prior to making a finding on whether you have made a non-frivolous allegation on the jurisdictional issue unless the party submitting it shows that the evidence or argument was not readily available prior to the close of the record. 5 C.F.R. § 1201.58(c).

If you did not make a non-frivolous allegation, I will dismiss your appeal. If you made such an allegation, I will schedule a hearing if you requested one or provide for the further supplementation of the record on the jurisdictional issue. In addressing this issue, you are **ORDERED** to address the fact that under provision 2 (a) and (b) of the August 22, 2011 settlement agreement you reached with the agency to resolve your EEO complaint, it states that you "acknowledg[e] that by entering this Agreement [your] decision to retire is both voluntary and irrevocable" and "that the reason given for [your] resignation will not be adverse or hostile to the Agency."

## ORDER ON JURISDICTION OVER "MIXED CASES"

In addition, it appears that the Board may lack jurisdiction over your appeal for another reason. When an appellant has been subjected to an action that is appealable to the Board, and alleges that the action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex,

national origin, handicap, or age, he may initially file a mixed case complaint with his employing agency, or a mixed case appeal with the Board, but not both, and whichever is filed first is deemed to be an election to proceed in that forum. *See* 5 U.S.C. § 7702(a): *McCoy v. U.S. Postal Service,* 108 M.S.P.R. 160, ¶ 12 (2008); 29 C.F.R. § 1614.302(b): 5 C.F.R. § 1201.154(a)-(b). An election is not valid unless the agency has properly informed the appellant of the election requirement and its consequences. *See McCoy,* 108 M.S.P.R. 160, ¶ 14; *Dawson v. U.S. Postal Service,* 45 M.S.P.R. 194, 197 (1990).

Here, it seems as if you made an election to file a formal EEO complaint prior to filing your Board appeal. If you filed under more than one procedure, the procedure under which you timely filed first shall be considered to be your elected procedure. As a result, it appears as if you filed your mixed case EEO complaint on the same matter with the agency prior to bringing the same claims to the Board's attention. Thus, it appears that you made a valid election to pursue your EEO complaint before filing your Board. It is not clear if you have exhausted the agency's EEO procedure, which might allow you with the right to appeal from the agency's final decision to the Board under 5 C.F.R. § 1201.154(b)(1).

Both parties are directed to review the same deadlines as listed above and they must respond to this additional jurisdictional issue within the same timeframes set forth previously.

**ORDER ON JURISDICTION OVER MATTERS PREVIOUSLY COVERED BY A SETTLEMENT AGREEMENT**

Next, it appears that the Board would lack jurisdiction over this appeal for a third reason. It seems, based on the evidence submitted, that because the subject of this appeal concerns a matter you previously settled before the EEO, the Board cannot review the same claims over which you entered into a settlement agreement with the agency. *See, e.g., Callaghan v. U.S. Postal Service,* EEOC Petition No. 03990095 (June 14, 2000). In particular, according to provision 1 of the EEO settlement agreement, it states that the parties "resolve[d] all existing matters concerning [the Appellant's] employment with the Agency, including ... any outstanding appeal rights." The same provision further states that the parties "resolve[d] all disputes between them concerning [the Appellant's] employment with the Agency, regardless of the forum, in existence on the effective date of this Agreement."

In the alternative, you may be alleging he entered into the EEO settlement agreement involuntarily due to agency coercion, misrepresentation, or fraud, and may be arguing that the Board should set aside the agreement for those reasons.

The Board will review a settlement agreement between an agency and an agency employee under certain circumstances. First, if a settlement agreement is put into the Board's record for enforcement purposes, the Board maintains jurisdiction over the agreement for compliance purposes. *See Singletary v. U.S. Postal Service,* 88 M.S.P.R. 158 (2001). Here, there is no indication that

the parties' EEO agreement was ever put into the record of any Board appeal.

Second, a party may seek to set aside a settlement agreement by showing the agreement is invalid because it is unlawful or is the result of fraud, coercion, or mutual mistake. In this type of situation, it is unnecessary that the administrative judge had previously entered the agreement into the record for enforcement purposes, although that is usually the case. Nevertheless, even if the agreement was not entered into the record, the agreement must have been reached as part of a Board appeal for the Board to consider it. *See Owen v. U.S. Postal Service,* 87 M.S.P.R. 449, ¶ 3-6 (2000). In this case, it does not appear that the parties' agreement was reached pursuant to a Board appeal.

Third, although the Board lacks jurisdiction over adverse actions where an employee has waived his or her appeal rights in a last-chance settlement agreement (LCSA), the Board will not enforce such a waiver if an agency breaches an LCSA. *See Link v. Department of the Treasury,* 51 F.3d 1577, 1581 (Fed. Cir. 1995). Under these circumstances, the Board will review the LCSA to determine if a breach occurred. Therefore, an appellant can always argue he or she did not breach the agreement.

In the instant appeal, however, the parties' EEO settlement agreement does not appear to be an LCSA, and the agency did not predicate the appellant's retirement on any breach of that agreement. *See Gibson v. Department of Veterans Affairs,* 160 F.3d 722, 725 (Fed. Cir. 1998). In the standard LCSA, an appellant agrees to waive his right to appeal an adverse action in exchange for the agency's promise to

allow him to retain his employment so long as he meets certain agreed-upon standards of conduct. If the appellant fails to meet those standards, then the agency effects the adverse action that was held in abeyance pending the duration of the LCSA.

Fourth, while the Board does not have the authority to enforce a settlement agreement not entered into the Board's record for enforcement purposes, the Board may consider the validity of agreements entered into proceedings not before the Board so as to determine their effect on a personnel action before the Board. *See Sullivan v. Department of Veterans Affairs*, 79 M.S.P.R. 81, 84 (1998). For example, the Board will consider the validity of a settlement agreement providing that an appellant resign from his position because an involuntary resignation is tantamount to a removal. *See Short v. U.S. Postal Service*, 66 M.S.P.R. 214, 218 (1995). Yet, in the present case, it seems the parties' EEO settlement agreement had no effect on the personnel action before the Board. *Cf. Williams v. U.S. Postal Service*, 95 M.S.P.R. 145, ¶¶ 7-10 (2003) (the Board found that the parties' settlement agreement was analogous to a LCSA, where the appellant agreed to a demotion in the event that the Office of Personnel Management (OPM) did not approve his application for disability retirement benefits, and then appealed that demotion when OPM denied his application).

Because the parties' EEO settlement agreement does not fit into any of the categories I have outlined above, it seems the Board lacks the authority to consider it. Allegedly involuntary settlement agreements are not independently appealable to the Board in every circumstance. As a result, it appears

that the Board lacks jurisdiction over both the appellant's retirement/resignation and any issue relating to his EEO settlement agreement with the agency. *See Shelton v. Department of the Air Force*, 382 F.3d 1335, 1337 (Fed. Cir. 2004); *Ramos v. Department of Justice*, 94 M.S.P.R. 623, ¶¶ 6-12 (2004).

The parties must review the same deadlines set forth above and must address this third jurisdictional issue within the same timeframes.

FOR THE BOARD: /s/ _____
Daniel Madden Turbitt
Administrative Judge

## 5 U.S.C. § 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title,

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

**5 U.S.C. § 7513. Cause and procedure**

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

**5 U.S.C. § 7702. Actions involving discrimination**

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate

procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

* * *

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of

this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board**

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel

practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

* * *